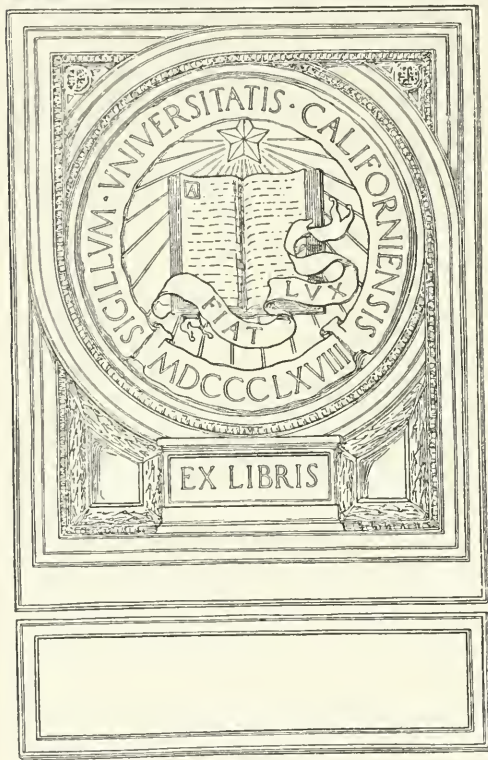




UNIVERSITY OF CALIFORNIA  
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IOWA ECONOMIC HISTORY SERIES

EDITED BY BENJAMIN F. SHAMBAUGH





WORK ACCIDENT INDEMNITY IN IOWA



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HISTORY OF  
WORK ACCIDENT INDEMNITY  
IN IOWA

BY  
E. H. DOWNEY

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## EDITOR'S INTRODUCTION

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This volume on the *History of Work Accident Indemnity in Iowa* is in a sense supplementary to the author's more general work on the *History of Labor Legislation in Iowa*, which appeared some two years ago as the first contribution to the *Iowa Economic History Series*. Dealing with the vital subject of employers' liability and workmen's compensation, both historically and comparatively, the present volume will be as valuable to students of comparative legislation as it will be interesting to students of Iowa history. Indeed, this book may well serve as a guide to constructive legislation.

BENJ. F. SHAMBAUGH

OFFICE OF THE SUPERINTENDENT AND EDITOR  
THE STATE HISTORICAL SOCIETY OF IOWA  
IOWA CITY 1912



## AUTHOR'S PREFACE

This volume is an outgrowth of the chapter on "The Law of Employers' Liability" in the writer's *History of Labor Legislation in Iowa* — a book published by The State Historical Society of Iowa in 1910. An expansion of that chapter which would bring the narrative down to date and supplement the analysis of Iowa laws with a comparative survey of accident indemnity in other States and countries was undertaken early in the spring of 1911 at the request of The State Historical Society of Iowa. Originally designed as a paper for the *Iowa Applied History Series*, it soon appeared that so short a sketch would not in itself be adequate in dealing with a subject at once so large, so complicated and, in the United States, so comparatively new. The study has, accordingly, grown to the proportions of a volume, and the paper which was at first planned has been issued as an abridgment in the *Iowa Applied History Series*.

The analysis of the common law as herein presented is somewhat more condensed than in the earlier chapter already mentioned. The cases have, however, been brought down to September, 1912; and the doctrines of "the last clear chance", of "acts of God", and of the servant's assumption of risks due to the master's violation of safety statutes have been more fully treated in order to incorporate later decisions. The other chapters of the present study are entirely new. The plan of the work and the inter-relation of the several parts will, it is hoped, sufficiently appear

from the table of contents. The very full quotations set out in the *Notes and References* are intended not only to justify but also to supplement the statements in the text.

The printed and manuscript sources used are indicated in the *Notes and References* which follow the text; but the personal assistance, without which this study could not have been successfully prosecuted, calls for further acknowledgment. The writer's thanks are due above all to Professor Benj. F. Shambaugh, Superintendent of The State Historical Society of Iowa. It was upon his suggestion that the study was undertaken and to his counsel and criticism much of whatever merit it may possess must be attributed. Valuable suggestions, as well as original data, were received from the Industrial Commission of Wisconsin, and especially from its chairman, Mr. C. H. Crownhart. Chairman John T. Clarkson and Secretary Welker Given of the Employers' Liability Commission of Iowa very kindly supplied the writer with the unpublished results of the Commission's labors. The writer is also under obligations to Messrs. Wallace D. Waple, William C. Archer, and E. E. Watson of the Ohio Liability Board of Awards. The employers' liability commissions and the industrial accident boards of many States generously responded to requests for information. Many courtesies were extended by the State Libraries of Ohio and Wisconsin, and more especially by Mr. A. J. Small of the Iowa State Law Library, who has made a very complete collection of workmen's compensation and employers' liability materials and who spared no pains to supply the writer with books and pamphlets not elsewhere accessible.



Invaluable service was rendered by the writer's wife in the preparation and verification of notes and particularly in the compilation of the illustrative tables. The entire volume was read in the galley proofs by Professor John R. Commons of the University of Wisconsin. Of the staff of The State Historical Society of Iowa, Dr. Dan E. Clark read the proofs and prepared the index, Miss Eliza Johnson verified many of the notes and references, and Miss Florence Franzén compiled the table of cases.

E. H. DOWNEY

THE STATE HISTORICAL SOCIETY OF IOWA  
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## I

### THE NEED OF INDEMNITY FOR WORK ACCIDENTS

The employers' liability law of Iowa, considered as a mode of indemnifying work accidents, has apparently been discredited by experience. Both the Iowa Federation of Labor and the State Manufacturers' Association have demanded the abrogation of the existing law in favor of a system based on fundamentally different principles.<sup>1</sup> The Employer's Liability Commission, appointed by the Governor under the authority of the Thirty-fourth General Assembly, has recommended a compensation act on lines novel to the jurisprudence of this State. Twenty-six foreign governments have abandoned the principles of liability which Iowa still retains and sixteen of the United States have recently enacted laws looking to the same end.<sup>2</sup> It is not unlikely that similar legislation will in the very near future be adopted by the General Assembly of Iowa.

The present is, therefore, an opportune moment for an historical and comparative survey which shall attempt to show how the present situation in respect to indemnity for work accidents arose, what are the grounds of dissatisfaction therewith, and what effects may be expected in the light of experience here and elsewhere from proposed modifications thereof. The point of departure for such a study necessarily is the social need which accident indemnity is designed to serve and in respect to which alone indemnity systems can be compared or criticised.

Work accidents in the United States, according to the best obtainable estimates, annually cause more than 35,000

deaths and about 2,000,000 injuries, whereof probably 500,000 produce disability lasting more than one week.<sup>3</sup> To employ a telling comparison, frequently made, the industrial casualties of a single year in this country alone equal the average annual casualties of the American Civil War, plus all those of the Philippine War, increased by all those of the Russo-Japanese War.<sup>4</sup> As many men are killed each fortnight in the ordinary course of work as went down with the Titanic. This single spectacular catastrophe appalled the civilized world and compelled governmental action in two hemispheres; while the ceaseless, day-by-day destruction of the industrial juggernaut excites so little attention that few States take the trouble to record the deaths and injuries.

The point especially to be emphasized in this connection is that the appalling waste of life revealed by the above-cited estimates is, in great part, unavoidable. Doubtless the number of work accidents may be considerably reduced in the United States, as it has been reduced in Europe, by preventive measures.<sup>5</sup> Yet when all possible precautions have been taken, modern industry will continue to exact a fearful toll of life and limb. Even in the German Empire, which leads the world in accident prevention, there were reported in the last year (1911) for which records are at present available 662,321 work injuries, whereof 9687 terminated fatally and 142,965 caused disability for more than thirteen weeks.<sup>6</sup> Scientific accident prevention in Germany has produced a lower accident rate and a much lower rate of fatal accidents than obtains in the United States,<sup>7</sup> but it has left the total casualty list of industry deplorably large. Indeed, the number of work injuries in Germany, as elsewhere, is increasing, both absolutely and relatively to the numbers employed, as industrial development goes forward.<sup>8</sup> The ugly fact is that work accidents, in the main, are due to causes inherent in mechanical industry on the one hand,

and in the hereditary traits of human nature on the other hand.

In the first place, a high degree of hazard inheres in present day methods of production. Modern technology makes use of the most subtle and resistless forces of nature — forces whose powers of destruction when they escape control are fully commensurate with their beneficent potency when kept in command. Moreover, these forces operate not the simple hand tools of other days, but a maze of complicated machinery which the individual workman can neither comprehend nor control but to the movements of which his own motions must closely conform in rate, range, and direction.<sup>9</sup> Nor is the worker's danger confined to the task in which he is himself engaged, nor to the appliances within his vision. A multitude of separate operations are combined into one comprehensive mechanical process, the successful consummation of which requires the coöperation of thousands of operatives and of countless pieces of apparatus in such close interdependence that a hidden defect of even a minor part, or a momentary lapse of memory or of attention by a single individual, may imperil the lives of hundreds.<sup>10</sup> A tower man misinterprets an order, or a brittle rail gives way, and a train loaded with human freight dashes to destruction. A miner tamps his "shot" with slack, and a dust explosion wipes out a score of lives. A steel beam yields to a pressure that it was calculated to bear, and a rising skyscraper collapses in consequence, burying a small army of workmen in the ruins.

In the second place, human nature, inherited from generations that knew not the machine, is imperfectly fitted for the strain put upon it by mechanical industry. Safely to perform their work the operatives of a modern mill, mine, or railway, should think consistently in terms of those mechanical laws to which alone present day industrial processes are amenable.<sup>11</sup> They should respond automatically

to the most varied mechanical exigencies,<sup>12</sup> and should be as insensible to fatigue and as unvarying in behavior as the machines they operate.<sup>13</sup>

Manifestly these are qualities which normal human beings do not possess in anything like the requisite degree. The common man is neither an automaton nor an animated slide-rule. His movements fall into a natural rhythm, indeed, but the beat is both less rapid and more irregular than the rhythm of most machines — with the consequence that he fails to remove his hand before the die descends or allows himself to be struck by the recoiling lever.<sup>14</sup> It requires an appreciable time for the red light or the warning gong to penetrate his consciousness and his response is apt to be tardy or in the wrong direction. Fatigue, also, overcomes him, slowing his movements, lengthening his reaction time, and diminishing his muscular accuracy — thereby trebly enhancing his liability to accident.<sup>15</sup>

The machine technology, in fact, covers so small a fraction of the life history of mankind that its discipline has not yet produced a mechanically standardized race, even in those communities and classes that are industrially most advanced.<sup>16</sup> And so there is a great number of work injuries due to the “negligence of the injured workman” — due, that is to say, to the shortcomings of human nature as measured by the standards of the mechanician. This mal-adjustment is aggravated by the never ceasing extension of machine methods to new fields of industry and the continued influx of children, women, and untrained peasants into mechanical employments.<sup>17</sup> Accordingly, the proportion of accidents attributable to want of knowledge, skill, strength, or care on the part of operatives appears everywhere to be increasing.<sup>18</sup>

There is, then, no prospect that the “carnage of peace” will be terminated, as the carnage of war may be, within the predictable future. An industrial community, such as Iowa,



must face the patent fact that work injuries on a tremendous scale are a permanent feature of modern life. Every mechanical employment has a predictable hazard: of a thousand men who climb to dizzy heights in erecting steel structures a certain number will fall to death, and of a thousand girls who feed metal strips into stamping machines a certain number will have their fingers crushed. So regularly do such injuries occur that every machine-made commodity may be said to have a definite cost in human blood and tears — a life for so many tons of coal, a lacerated hand for so many laundered shirts.

This "blood tax" of industry, as it may well be termed, can in no wise be shared or shifted. There can be no compensation "for the torment of the scorched body, for the delirium of terror in the fall through endless hollow squares of steel beams down to the death-delaying construction planks of the rising skyscraper, for the thirst in the night in the hospital, for the sinking qualms of the march to the operating-table, for the perpetual ghostly consciousness of the missing limb — for these things and for the whole hideous host of things like them, following upon the half million accidents that happen to American workmen every year. . . .

"Nor can there be compensation for what follows the telling of the tale by some fellow-workman at the door of the stricken comrade's home. There can be no compensation for the stretching-out of a woman's hand, in search of support, against the door's swinging edge. . . . Payment is beyond human power for the emptiness of a father's chair while the girl that was a baby is growing up to be a young woman among young men." <sup>19</sup>

It is otherwise, however, with the expense of burying the dead and caring for the wounded and with the wages lost through the death or disability of breadwinners. These pecuniary costs of work accidents may be distributed in any

manner that the community may deem just and expedient. The burden may be imposed wholly upon the individual sufferers and their dependents; it may be distributed over industrial workers as a class by compulsory accident insurance, or over society at large through a system of pensions; or it may be taxed to the consumers of the products that occasioned the injuries.

The consequences of imposing this pecuniary burden upon the injured workmen and their families are such as no civilized community can afford to tolerate. Work accidents, in the nature of the case, are sustained principally by wage-earners, who are substantially propertyless as a matter of course,<sup>20</sup> who have no savings to speak of,<sup>21</sup> and whose incomes, for the most part, are too small to leave any adequate margin for accident insurance.<sup>22</sup> The almost total absence of property or savings among wage-workers is abundantly demonstrated by tax returns and the records of savings banks and life insurance companies.<sup>23</sup> But wage statistics are yet more conclusive to the same effect. A recent investigator of this subject, Professor Scott Nearing of the University of Pennsylvania, concludes that one-half of the adult male wage-workers of the United States receive less than \$500 a year; that three-fourths of them get less than \$600; and that only ten per cent are in receipt of more than \$800 annually. As to women wage-workers, three-fifths are receiving less than \$325 yearly; nine-tenths are paid less than \$500; and only one in twenty is paid more than \$600.<sup>24</sup> These estimates are well substantiated by the findings of other investigators. More than half of the workmen injured in the Pittsburgh District in 1907 were earning less than \$15 weekly (making no allowance for unemployment) at the time of injury.<sup>25</sup> Of the men sustaining industrial injuries in Minnesota in 1909-1910, forty-seven per cent were receiving less than \$12.50 and seventy-eight per cent were receiving less than \$15 weekly.<sup>26</sup>

It needs no argument to show that families in receipt of incomes such as these can have neither property, savings accounts, nor insurance. And this conclusion, finally, is corroborated by investigations into the insurance actually carried by wage-workers. Of 132 married men killed in Pittsburgh, only six had insurance in substantial amount and only 25 out of 214 left savings, insurance, and trade union and fraternal benefits to the amount of \$500 each.<sup>27</sup> In New York State 175 workingmen who suffered fatal or permanently disabling accidents had insurance in the aggregate sum of \$18,635.<sup>28</sup> Nor are these extreme instances selected to make out a case. The average value of 13,448,124 "industrial insurance" policies in force in 1902 was only \$135.<sup>29</sup> The unvarnished fact is that the wage-earner neither does, nor can, provide for the contingencies of sickness, accident, and unemployment.<sup>30</sup>

To the wage-worker, then, even when no one but himself is dependent on his earnings, the loss of a few weeks' wages means serious privation, and permanent incapacity means beggary. But quite half the victims of work accidents are married men, and a majority of even the unmarried contribute to the support of others. For example, of 467 fatal accidents in Allegheny County, Pennsylvania, 258 were sustained by married men and 129 others by regular contributors to the support of relatives; whereas only 80 of the 467 dead were wholly without dependents.<sup>31</sup> Of 285 fatal accidents investigated in Cuyahoga County, Ohio, 176 were suffered by heads of families.<sup>32</sup> Of 1476 men killed on the job in New York State, 679 were the sole supporters of 1775 dependents, 167 were the principal supporters of 520 dependents, and 252 contributed to the support of 668 relatives — leaving but 378, or thirty-five per cent of the whole number of deceased entirely without economic responsibilities.<sup>33</sup> In Wisconsin forty-three per cent of the injured



workmen whose conjugal condition could be learned by the State Bureau of Labor were married.<sup>34</sup>

A serious work accident, therefore, commonly deprives a necessitous family of its sole, or chief, or at least a very important, source of income. The inevitable result, in the absence of systematic accident indemnity, is poverty, and the long train of social evils that spring from poverty. It is not only that the victims of unindemnified work accidents suffer prolonged incapacity and often needless death from want of means to obtain proper care, not only that families are compelled to reduce a standard of living already low and that women and children are forced into employments unsuited to their age and sex, with resultant physical and moral deterioration; but it is that the ever-present fear of undeserved want goes far to impair that spirit of hopefulness and enterprise upon which industrial efficiency so largely depends.

Lest anyone suppose that similar conditions do not obtain in agricultural Iowa, let it be recalled that the railways and mines of this State took the lives of 114 workmen and inflicted 14,863 injuries upon employees within the decade 1901-1910.<sup>35</sup> How many factory and building accidents occurred during the same period can not be told from extant records. If the number *reported* since 1906 may be taken as a rough guide such accidents must have caused, during the ten years, more than 100 deaths and at least 12,000 injuries.<sup>36</sup> Taking the returns at their face value, not far from 125 deaths and 3000 injuries annually are sustained in the capitalistic industries of Iowa.

But the returns can not be accepted at their face value. The accident records of the Iowa Bureau of Labor Statistics, especially, are notoriously incomplete.<sup>37</sup> The slightest comparison with the records of other States will demonstrate their unreliability. During the first eight months of the current year there were reported to the Wash-

ington Industrial Insurance Commission 6985 accidents, whereof 5844 were made the bases of claims for compensation.<sup>38</sup> At this rate more than 10,000 accidents and nearly 9000 disabling injuries occur in a single year among the 125,000 persons in hazardous employments in the State of Washington. Indeed, the actual rate appears to be somewhat higher, since full returns under the law were not secured until it had been some months in operation.

The Washington returns are borne out by those of other States. The Workmen's Compensation Commission of Michigan estimated that 13,000 injuries were sustained by the 250,000 industrial workmen of that Commonwealth in 1910.<sup>39</sup> More than 5000 accidents causing disability for more than seven days were reported to the Wisconsin Industrial Commission in the ten months ending June 30, 1912.<sup>40</sup> The employments covered by the above-mentioned reports engage approximately 150,000 wage-workers in Iowa. Unless it be supposed that such industries are only one-third as hazardous in this State as in other American Commonwealths, the official return of 3351 work accidents in 1910 can only be regarded as evidence of its own incompleteness. The Iowa reports of accidents on railways and in coal mines seem to be fairly trustworthy. For other industries the official returns must be multiplied by two or three to arrive at the true figures. It is safe to say that the number of work injuries causing disability for more than one week runs into the thousands annually.

Unless, therefore, hundreds of innocent families in this State are each year to be rendered destitute through deaths and injuries unavoidably incurred in producing the community's wealth, systematic indemnity for work accidents must be provided. How the cost of such indemnity may be so distributed as to entail the minimum of loss and damage upon the Commonwealth is the problem to which the advocates of employers' liability reform must address them-

selves. Since the existing situation is, necessarily, the starting point for any proposed reform an attempt will be made in the following chapters to show how the people of Iowa have dealt with this problem hitherto, and with what results.

## II

### THE GENESIS OF EMPLOYERS' LIABILITY

The existing legal system of accident indemnity in Iowa is based upon the common law of employers' liability. The common law, to be sure, has been considerably modified by statute, and it has also received something of a specifically local character from a long line of Iowa decisions. But neither the legislators nor the courts of Iowa have overthrown the fundamental principles of liability laid down in England and in the older American Commonwealths before the question of responsibility for work accidents was raised in this State. To understand the present status of accident indemnity in Iowa it is necessary, therefore, to examine the circumstances under which the common law doctrines arose and to sketch the mutations which these doctrines have undergone as they have come to be applied to modern economic conditions.

Work accidents in England and America began to assume serious proportions toward the middle of the nineteenth century with the development of machine manufacturing, steam transportation, large-scale mining, and other characteristically modern industries. Wage contracts, then as now, made no provision for injuries sustained in the course of work.<sup>41</sup> There was no legislation upon the subject, so that the courts were called upon to determine whether the money losses occasioned by such injuries should be borne in the first instance by employers or employees. This question had, of course, to be decided on the basis of existing juristic principles. But there were no controlling precedents.<sup>42</sup> A new body of law was to be created by successive decisions,

and the character of that law was mainly determined by the judges' views of public policy <sup>43</sup>—that is to say, by “the sum of prejudices, and the political, social and economic convictions of the dominant classes of which they [the courts] themselves are a part.” <sup>44</sup> The genesis of employers' liability is, accordingly, to be sought in the principles which seventy-five years ago governed responsibility for accidental injuries in general, and in the prevalent social philosophy by which these principles were interpreted and applied.

In the second quarter of the nineteenth century, the common law had come to recognize three categories <sup>45</sup> of unintended injuries to person and property, as respects pecuniary liability therefor: (1) injuries caused by pure misadventure, for which, if occurring in the ordinary relations of life, no one was liable; (2) injuries negligently inflicted, for which the negligent person was liable; (3) injuries arising from “acts done at peril”, for which the doer was liable notwithstanding he neither intended the injury nor was guilty of any negligence in the premises. <sup>46</sup> The important question for the future of employers' liability was, under which of these classes of torts should work accidents be placed?

Starting from the immemorial principle that every one is bound so to conduct his own affairs that others shall receive no harm therefrom, <sup>47</sup> it might have been possible to hold that he who employs dangerous instrumentalities for his own profit does so “at his peril” and must answer in damages for any injury to person or property thereby occasioned. Such was the common law liability of one who kept a vicious animal, <sup>48</sup> or who permitted fire <sup>49</sup> to escape, or cattle <sup>50</sup> to stray, from his premises. This principle, that certain things are done or kept at peril, was applied by the courts to some, at least, of the innovations consequent upon the industrial revolution. Thus it was held in England that



one who impounds water on his land, or who brings thereon "any other thing which will, if it escape, naturally do damage", must keep it "at his peril".<sup>51</sup> So, too, under the earlier decisions the user of a steam engine was liable for fires started by it without fault on his part.<sup>52</sup> Said Lord Justice Bramwell in deciding a traction-engine case: "It is just and reasonable that if a person uses a dangerous machine, he should pay for the damage which it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person."<sup>53</sup> Had a similar view of the liability for work accidents been adopted by the courts, the "ordinary", or "occupational", risks, in extra-hazardous employments at least, would have been thrown upon the employer, and indemnity would have been provided for much the greater number of industrial injuries. Such might very well have been the course of the law had present day views of collective responsibility for socially-created evils been entertained by our great-grandfathers.

Unfortunately, as seen from the modern standpoint, the leading employers' liability cases,<sup>54</sup> from which the whole subsequent juristic development received its tone and direction, were decided at the very moment when the *laissez faire* movement in economic and political thought reached its culmination.<sup>55</sup> These early cases arose in communities where capitalism was just coming into dominance,<sup>56</sup> where wage-workers as yet had no effective voice in government, and where the propertied and business classes, who possessed the preponderating political influence,<sup>57</sup> had but lately secured the abolition of hampering feudal restrictions and were impatient of any restraint upon their new-born liberty.

In such communities and under such social conditions was matured the highly individualistic natural rights philosophy of the common law.<sup>58</sup> The protection of private property

became the chief function of the state.<sup>59</sup> The teaching of Adam Smith that the unrestrained pursuit of individual self-interest will necessarily promote the general welfare,<sup>60</sup> and of Thomas Jefferson that that is the best government which governs least<sup>61</sup> were deemed irrefutable if not actually inspired.<sup>62</sup> Superior wealth and social position were looked upon as "natural" advantages which the state had no right to neutralize.<sup>63</sup> Given only freedom of contract, equality before the law, and protection from violence and fraud, it was believed that every man might safely be left to fend for himself.<sup>64</sup> Such was the genesis of the theory that the wage-worker stands on equal terms with his employer, that he is able to choose the conditions under which he will consent to serve, may decline any employment which he deems unduly hazardous, and can exact extra pay for extra risk.

The judges of a half century since were steeped in this individualistic philosophy. The older and more influential among them had gathered their impressions of industrial conditions from the regime of handicraft and petty trade, which was then just passing away but which had been dominant in the days of their youth.<sup>65</sup> All had learned the rudiments of law from Blackstone, who was inclined to subordinate the public good to private right,<sup>66</sup> and had imbibed the principles of political economy from those disciples of Jeremy Bentham who took the individual for the center of the economic universe.<sup>67</sup> Moreover, in point of birth and association the judges of that day, almost without exception, belonged to the propertied and business classes, and in consequence had little sympathy with, or understanding of, the position and claims of wage-workers.<sup>68</sup>

In the light, then, of the circumstances of seventy-five years ago it is not strange that courts should have sought to restrict the master's liability for work accidents within the narrowest possible limits. It was felt that to make the em-

ployer bear the pecuniary loss of injuries due to ordinary trade hazards would impose an intolerable burden upon business enterprise, retard the accumulation of capital, and discourage investment to the serious detriment of the community.<sup>69</sup>

Ample ground for such restriction of liability was found in existing principles of the common law. Liability without fault was, in the second quarter of the nineteenth century, highly exceptional and anomalous,<sup>70</sup> being nearly confined (1) to the small category of "acts of peril" which had been inherited from primitive English law,<sup>71</sup> (2) to cases of "imputed fault", like the liability of a master for the torts of his servant<sup>72</sup> or of a husband for those of his wife,<sup>73</sup> and (3) to such persons as common carriers and inn-keepers upon whom unusual liabilities were imposed because others had no practical alternative but to trust to their fidelity and prudence.<sup>74</sup> The general rule, as contra-distinguished from these exceptional cases, confined liability to injuries arising from the failure to use reasonable care.<sup>75</sup> Moreover, no one ordinarily was under any legal obligation to protect another from dangers which that other knew of, or could reasonably discover<sup>76</sup> and guard against,<sup>77</sup> or to which he had voluntarily subjected himself.<sup>78</sup> So a shop-keeper discharged his duty to protect his patrons from personal injury if he kept his premises in reasonable repair or if, neglecting repairs, he warned them of dangerous conditions.<sup>79</sup>

The foregoing principles, drawn from the ordinary voluntary relations of life, were applied without mitigation to the relationship of employer and employee. The courts, adopting an academic theory of "liberty and equality"<sup>80</sup> and ignoring the actual situation of the parties to wage contracts,<sup>81</sup> treated wage-workers as, in the fullest sense, voluntary agents.<sup>82</sup> Hence it was held, on the one hand, that the employer is bound merely to use ordinary care for the safety of his employees, and on the other hand, that the employee



takes on himself the risk of all dangers which are, or reasonably should be, known to him, and which, therefore, he "voluntarily encounters" by entering upon, or continuing in, the service. Upon these foundations was reared the whole fabric of employers' liability doctrines — doctrines thoroughly consonant, in the main, with the genius of the common law and with the social philosophy prevalent at the time and place of their origin.<sup>83</sup>

The social conditions under which the common law rules of employers' liability originated, and to which they were (presumably) adapted, have long since passed away. The machine industry has in the course of three generations wrought a revolution in the economic life of civilized mankind greater, in many respects, than the changes of the preceding three thousand years. The new mode of industrial life has brought in its train new views of social responsibility and of the scope and ends of government.<sup>84</sup> Whence it happened that the "system of natural liberty" had scarcely received definitive formulation before it began to be discredited and that it now finds a precarious lodgment only in the archaic abode of constitutional law.<sup>85</sup> But the employers' liability doctrines, which owed their genesis to the society of artisans and shop-keepers and their authentication to the metaphysics of *laissez faire*, live on even after they have been condemned by the very classes in whose supposed interest they were invented.<sup>86</sup>

How juristic principles which took shape some three quarters of a century since are applied in Iowa at the present day will, it is hoped, sufficiently appear in the course of the ensuing analysis.

### III

#### AN ANALYSIS OF EMPLOYERS' LIABILITY

Three quarters of a century of ever-increasing litigation and of amendatory legislation in scores of separate jurisdictions have made employers' liability one of the most involved and intricate branches of the law, have multiplied definitions more recondite and distinctions more elusive than those of the marginal utility theory, and have given rise to conflicts of decisions that are the despair of jurists.<sup>87</sup> A becoming cognizance of his own limitations might well deter a mere layman from rushing into a field so beset with pitfalls for even the trained lawyer. Yet the guiding principles of employers' liability are neither many nor difficult to comprehend. It is in the detailed ramifications of the law, and especially in the variations from one jurisdiction to another, that confusion is encountered. An analysis of the main features of employers' liability in a single State, accordingly, presents no insuperable obstacles; at the same time such an analysis is essential to a clear view of the situation which the present reform movement in Iowa seeks to remedy.

The several doctrines comprised in the law of employers' liability will, in the present analysis, be grouped under these captions: (1) duties of the employer, (2) the burden of occupational risks, (3) the fellow-servant rule, (4) contributory negligence and (5) assumption of risk. It is not claimed that this arrangement is logically unimpeachable; but it is hoped that the common origin and the mutual relations of the several doctrines will be made sufficiently clear in the course of the analysis based thereon.

## DUTIES OF THE EMPLOYER

The cardinal principle of the common law of employers' liability, upon which all else depends, is that the employer is liable only for such injuries as are due to some "fault" or negligence on his part,<sup>88</sup> that is, to some breach of the employer's legal duty to provide for the safety of his employees.<sup>89</sup> It seems advisable, therefore, to begin the present analysis with a statement of the extent and limits of this duty.

It was laid down in the earliest cases, and is indeed but a particular application of the general rule governing voluntary relations, that a master is bound to use reasonable care to protect his servant from injury while engaged in his service.<sup>90</sup> Subsequent decisions have defined this obligation of the employer with great particularity and have divided it into several so-called "absolute duties": (1) to provide a safe place to work;<sup>91</sup> (2) to furnish safe and adequate tools, appliances and instrumentalities for carrying on the work;<sup>92</sup> (3) to hire a sufficient number of reasonably competent and careful servants;<sup>93</sup> (4) to conduct the business in a safe manner with sufficient rules for the guidance of employees, where such rules are reasonably necessary to their safety;<sup>94</sup> (5) to instruct inexperienced servants in the safe performance of their duties;<sup>95</sup> (6) to warn a servant of dangers which are, or in the exercise of reasonable care should be, known to the master, but which are not known to, or readily discoverable by, the servant;<sup>96</sup> and (7) to make such frequent and thorough inspection of working place, materials, and equipment as may be reasonably necessary to maintain them in a safe condition.<sup>97</sup>

None of the foregoing duties of the master is absolute. He does not warrant the safety of his premises;<sup>98</sup> it is enough if he maintains "reasonably" safe conditions and surroundings of work,<sup>99</sup> so far as that can be done by the ex-

ercise of ordinary care,<sup>100</sup> that is, such care as a person of average prudence would exercise under the same or similar circumstances.<sup>101</sup> Of course the conduct of "a reasonably prudent and careful man" can afford no definite standard of "ordinary care" or "reasonable safety",<sup>102</sup> since what is reasonable will depend upon the character of the undertaking in hand and the risks attending its prosecution.<sup>103</sup> As has been judicially said, "reasonable care demands increased watchfulness and greater caution in proportion to the dangerous nature of the instrumentality employed; that is, 'due care' means care which is reasonably commensurate with a known danger and the seriousness of the consequences which are liable to follow its omission." <sup>104</sup> Hence in handling electricity "reasonable care" is great care.<sup>105</sup> So, too, it is negligent to run a train at high speed over a road bed that has been softened by recent rains, although similar speed would not be dangerous under normal conditions.<sup>106</sup>

Reasonable care only requires the master to provide against dangers that can reasonably be anticipated <sup>107</sup> and to remedy conditions of which he has knowledge, actual or constructive.<sup>108</sup> Notice will, however, be presumed when a dangerous condition has existed for such a length of time that the employer, in the exercise of ordinary care, could have discovered it.<sup>109</sup>

The employer is not required to use the safest equipment that can be obtained,<sup>110</sup> nor is he bound to adopt any new device until its utility has been sufficiently tested and it has been shown to be, as a whole, better than the appliance already in use for the same purpose.<sup>111</sup> Thus it is not necessarily negligent to operate locomotives equipped only with link-and-pin couplers,<sup>112</sup> or to leave dangerous machinery unguarded,<sup>113</sup> although practical safety devices may be known. Ordinarily, it is sufficient if the employer use such precautions as are customary in similar establishments; <sup>114</sup>

and the general usage of employers in the same line of business may always be shown as bearing upon the question of care.<sup>115</sup> Proof of common usage, however, is not proof of care<sup>116</sup> and is no defense where the custom is in itself careless.<sup>117</sup>

The only definite standard of "reasonable care" appears to be that afforded by statutes expressly enacted for the protection of employees. The violation of such a statute is negligence *per se*.<sup>118</sup> Thus, it is negligent to operate railway cars not equipped in accordance with the automatic coupler law,<sup>119</sup> to maintain trolley wires at a lower level than is permitted by city ordinance,<sup>120</sup> to omit machine guards<sup>121</sup> or belt shifters<sup>122</sup> where such appliances are prescribed by the factory acts, to supply a less amount of air in a coal mine than the mine law requires,<sup>123</sup> or to operate trains at an illegal rate of speed.<sup>124</sup> In the absence of such statutory commands or inhibitions, what is reasonable care can only be determined by the particular circumstances of each case.

The master's obligation to protect his servant from probable dangers applies only while the latter is in the line of his duty: one who voluntarily undertakes a task outside the scope of his employment, or who goes into an unauthorized place of danger, becomes a mere volunteer or licensee, to whom the master owes no duty of protection until his peril is discovered.<sup>125</sup> But a servant is within the "scope of his employment" in engaging in work which he customarily performs with the knowledge, actual or constructive, of the master or his representative, though without express authorization.<sup>126</sup> *A fortiori*, the express command of the employer or his responsible representative brings the act commanded within the line of the employee's duty.<sup>127</sup> Where the effect of such an order is to expose the employee to greater peril than would be encountered in the usual scope of the latter's employment, the giving of the command is actionable negligence.<sup>128</sup>



Mere proof of negligence does not constitute sufficient ground of recovery: it must further appear that the negligence complained of was the *proximate cause* of the injury in respect of which recovery is sought.<sup>129</sup> That is to say, there can be no recovery unless it is shown that some negligent act or omission of the employer, in a natural and continuous sequence, would have produced the employee's injury, and that without such negligence the injury would not have occurred.<sup>130</sup> "Proximate cause", it has been judicially said, "is probable cause, and the proximate consequence of a given act or omission . . . . is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrong doer."<sup>131</sup> Hence the employer is not liable for his failure to provide against improbable contingencies.<sup>132</sup> But where a given act or omission is negligent in respect of its probable consequences it will be treated as the proximate cause of an injury which would not have occurred but for such negligence, even though the accident which actually takes place is so unusual or extraordinary that it could not have been foreseen.<sup>133</sup> So, too, where the employer's negligence concurs with that of a third party,<sup>134</sup> or with an "act of God",<sup>135</sup> to produce an injury, the employer is liable.

The plaintiff in an employers' liability case has, of course, the "burden of proof" to show both that his employer was negligent and that such negligence was the proximate cause of the injury complained of.<sup>136</sup> That is to say, to justify recovery both of these essential facts must be established by a fair preponderance of all the evidence in the case. Negligence and proximate cause are ordinarily questions of fact, to be determined by a jury under proper instructions from the trial judge.<sup>137</sup> But where there is no evidence to warrant a finding of negligence, or where, in the opinion of the trial court, reasonable men could not honestly conclude that the alleged negligence of the employer was the proximate cause

of the injury, it is the duty of the court to direct a verdict for the defendant.<sup>138</sup>

#### THE BURDEN OF OCCUPATIONAL RISKS

The cardinal principle of no liability without fault manifestly relieves the employer of all responsibility for the inherent hazards of industry. Despite the exercise of ordinary care on the part of all concerned, slate and coal will fall from the roofs of mines, railway tracks will unexpectedly slip on softened roadbeds, signals will be misread by trainmen, dynamite will explode prematurely, steam pipes will burst, molten metal will splash upon those who handle it, and structural iron workers will slip from their precarious perches and be hurled to death. These and countless similar occurrences, accounting in the aggregate for fully one-half of all industrial injuries,<sup>139</sup> are no one's fault. They are inherent hazards of the work and the risk of injury from them, under existing Iowa law, is the worker's own.

The servant's assumption of these inherent or "ordinary" risks, being but a corollary of the rule which makes the master liable only for his failure to use reasonable care, must rest upon the same juristic principles and the same considerations of public policy as the main rule itself. To be sure, the courts have commonly said that the servant assumes the ordinary risks of the service in which he engages by virtue of an implied term in the contract of employment.<sup>140</sup> But this, manifestly, is no more than a judicial fiction. Prior to a legal determination of their respective rights and duties the parties to a contract of service can have had no understanding as to responsibility for trade hazards. The servant's assumption of such hazards is implied by law from the relationship of master and servant,<sup>141</sup> without reference to any consent of the parties thereto, and is in no proper sense contractual.<sup>142</sup> Nor does the fiction of an implied contract afford any independent support to the

juridicial doctrine ostensibly founded thereon; it would have been as easy for the courts to say, *de novo*, that the master "impliedly" warrants his servant's safety as that the servant "impliedly" assumes the risks of his employment. The whole train of reasoning as to contractual assumption "amounts to saying that the law is that he cannot recover because he takes the risk, and he takes the risk because the law is so."<sup>143</sup> Why the law is so has been considered in an earlier section.<sup>144</sup>

Since the ordinary risks of an employment are assumed by the servant as a matter of law (and as to them the master is relieved of all responsibility), the determination of what risks are to be deemed ordinary becomes a matter of great importance. The question may be approached from either of two directions: the care required of the master, or the knowledge imputed to the servant.

On the one hand, ordinary risks are defined as all such danger and exposure to injury as are naturally incident to or connected with the service after the master has fulfilled his duty to take reasonable care for the safety of his employees.<sup>145</sup> But this statement, while satisfactory as regards the "inherent risks" of the business, does not fully cover the "ordinary risks" assumed by employees.

Approached from the standpoint of the servant's knowledge, and seen in the light of the common law principle that everyone takes on himself the risk of any danger which he voluntarily encounters,<sup>146</sup> ordinary risks include all those which the servant, as a reasonably prudent and careful man, should expect to encounter in the course of his employment.<sup>147</sup> The servant thus assumes, not only all risks incident to the business when conducted in a reasonably careful manner,<sup>148</sup> but also all risks due to conditions which may be ascertained by the exercise of ordinary diligence at the time of entering the employment.<sup>149</sup> All open and obvious dangers are, accordingly, to be considered as risks incident to



the employment,<sup>150</sup> although such dangers result from the defective character of the instrumentalities used,<sup>151</sup> or from the negligent conditions, whether permanent<sup>152</sup> or temporary,<sup>153</sup> under which the business is openly conducted.

The ordinary risks of an employment always include those which inhere in the nature of the business.<sup>154</sup> One who engages in an extra-hazardous employment thus takes upon himself the extra perils incident thereto.<sup>155</sup> Thus, one employed to make a dangerous place safe can not recover for injuries incurred by reason of the very danger which he undertakes to remove, since that is a danger incident to his employment.<sup>156</sup> So, too, a servant assumes any risk of injury created by the progress of the work in which he is engaged.<sup>157</sup> If, for example, he is employed to demolish a building, the risk of injury from the collapse of the walls or the falling of overhanging material is his own.<sup>158</sup> In all these cases, however, the servant assumes only those risks which are naturally incident to the employment, while the master's duty not to expose him to any injury which may reasonably be anticipated and guarded against remains unimpaired.<sup>159</sup>

Knowledge and appreciation of danger are essential elements in the assumption of risk.<sup>160</sup> But knowledge and appreciation of the ordinary risks of an employment may be presumed from the fact of undertaking the service; for one who enters an employment "impliedly represents" that he has the experience to perform properly the duties of his position and that he understands the usual dangers attending the employment in which he engages.<sup>161</sup> The age and experience of an employee are, however, to be considered in determining whether he comprehended and so assumed a particular risk.<sup>162</sup>

The assumption of ordinary risks is not a defense of the master and need not be pleaded by him: the issue as to such risks is sufficiently raised by a general denial of negli-

gence.<sup>163</sup> Indeed, as has already been pointed out, an averment that an injury was due to an ordinary risk of the business amounts to a denial that it was caused by the employer's negligence. Still, the defendant in an employers' liability suit will ordinarily seek to show, by way of rebuttal, that the injury complained of was attributable to one of those ordinary risks for which the employer is not liable.

#### THE FELLOW-SERVANT RULE

The doctrines already discussed hold the employer to exercise reasonable care for the safety of his employees and exempt him from responsibility for inherent occupational hazards. So much was settled in accordance with general common law principles and has never occasioned serious division among the courts. A more difficult question was raised by those injuries, very numerous in every large industrial establishment, which are attributable to error of judgment, forgetfulness, or want of skill, care, or attention on the part of co-employees.

On the one hand, the courts were confronted with the very ancient<sup>164</sup> and thoroughly established doctrine that a master is answerable to third parties for injuries negligently, or even wilfully, inflicted by his servants, acting within the scope of their employment<sup>165</sup> — notwithstanding the master may have been free from fault, both in the selection of his agents and in his instructions to them.<sup>166</sup> This rule was conceded, even seventy years ago, to rest on sufficient grounds of public policy,<sup>167</sup> and it has latterly found fresh justification in the growth of corporations and other large employers who, but for the doctrine of *respondeat superior*, would escape all responsibility for injuries to the persons or property of others.<sup>168</sup> If, then, the general rules of law were to be followed, the master would be liable for the torts of his servant even when the complainant was a co-employee of the actual wrong-doer.

On the other hand, the doctrine of *respondeat superior* was felt to be a harsh one, even in its application to injuries suffered by strangers.<sup>169</sup> To extend the rule to cases where employees were the sufferers would, it was believed, impose an intolerable burden upon industrial enterprise.<sup>170</sup> Accordingly, when the courts were called upon, some seventy-five years ago, to apply the doctrine of *respondeat superior* to an injury sustained by a workman through the negligence of a co-employee, they "boldly invented an exception to the general rule of masters' liability, by which servants were deprived of its protection."<sup>171</sup>

Such an exception appears to have been first suggested in *Priestley vs. Fowler*, decided by the English Exchequer Court in 1837. A butcher driver's helper, who had been injured by the breaking down of the butcher's van, whereon he was riding, brought suit against the butcher on the grounds (1) that the van was insufficient for its purpose — in modern legal parlance was "an unsafe place to work" — and (2) that it had been negligently overloaded by the driver. Chief Baron Abinger, delivering the opinion of the Court, held that the plaintiff could not recover. His lordship alleged three grounds for this decision. (1) If recovery were allowed in this case the master's liability would be found to extend very far. "The footman . . . may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman. . . . The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead . . . for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of the

builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins." (2) "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. . . . The plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." (3) "To allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." <sup>172</sup>

The passages above set out show that the Priestley case is an authority both for the assumption by the servant of risks due to the master's negligence and for the fellow-servant rule. Upon the latter point, however, Lord Abinger's opinion contains no definitive pronouncement and the curious mingling of house-servants, contractors, and independent tradesmen, of dangers arising from the negligence of co-employees and from the master's failure to provide safe instrumentalities for carrying on his business, indicate that his lordship had not clearly thought out the principles or the implications of his own decision.

Four years later than the Priestley case, though without referring to it, the South Carolina Court of Errors denied recovery to a locomotive fireman who had been injured by the negligence of the engineer under whom he worked. The majority opinion was placed on these grounds: (1) that the contract of employment did not make the railway com-



pany a guarantor to one employee against the negligence of other employees; (2) that the fireman was, or ought to have been, aware of the perils to which his employment exposed him, including the likelihood that fellow-employees would be negligent, and must be presumed to have undertaken to meet these perils; and (3) that the plaintiff was paid for his labor and for the dangers to which he was exposed.<sup>173</sup>

Neither of the foregoing decisions was very broad in scope. In the Priestley case the master was a small employer engaged in a hand trade and the plaintiff was closely associated, in the discharge of his duties, with the employee whose negligence occasioned his injury. In the South Carolina case, also, the injured and the culpable employee were upon the same engine, and it could be colorably argued that the former had chosen to work with this particular associate after having an opportunity to observe his habits.

It remained for Chief Justice Shaw, of the Massachusetts Supreme Judicial Court, to give the fellow-servant rule definitive formulation and sweeping applicability. This result was accomplished in the famous case of *Farwell vs. Boston and Worcester Railroad Corporation* (4 Metcalf 49), decided in 1842. An engineer had lost a leg because a switchman had neglected to change a switch. The switchman had been long in the company's employ and was reputed ordinarily careful, so that the corporation was not at fault in retaining him. On the other hand, the engineer had no control over the switchman's actions and no opportunity to know of, or to guard against, his carelessness. These facts squarely presented the question, is a master liable to one of his employees for an injury which was caused by the negligence of another employee and which neither the master nor the injured workman could have prevented by the exercise of ordinary care? Chief Justice Shaw, in a luminous decision, answered this question in the negative and

fortified his opinion with a chain of reasoning that was accepted as conclusive by his contemporaries of the bench and bar. The validity of the learned judge's arguments will be considered at a later point in the present exposition (See below, p. 34).

The doctrine of the Farwell case was quickly accepted in other common law jurisdictions,<sup>174</sup> and within twenty years was as well established as the rule of *respondeat superior* to which it is an exception. The question was thus foreclosed when, in 1860, the earliest case presenting it reached the Supreme Court of Iowa.<sup>175</sup> The fellow-servant rule, accordingly, was imported bodily into the law of this State. None the less, the determination of the precise limits of the rule and its application to particular cases have given rise to a huge volume of litigation continuing to the present day.

The fellow-servant rule, or the doctrine of co-employment or co-service, as it is variously termed, has been judicially stated thus: "Where different persons are employed by the same principal in a common enterprise, no action can be brought by them against their employer on account of injuries sustained by one employee through the negligence of another."<sup>176</sup> This language, and that of the early cases generally, is broad enough to include all persons employed by the same master in the prosecution of the same general business. The British courts, at least, did not shrink from this very broad, but strictly logical, interpretation.<sup>177</sup> So interpreted, the doctrine exempts a corporation, which necessarily acts only through agents, from all liability to its employees — except perhaps for negligence in selecting its agents or in retaining them with notice of their carelessness or incompetence. American courts, however, commonly have construed the doctrine more narrowly and have invented several exceptions to the great exception whereby its harshness is somewhat mitigated. Thus have grown up the doctrines of "non-delegable duties", "vice-principalship",

and "department of service". Of these qualifying doctrines only the first mentioned is well established in Iowa, though the others have occasionally been recognized.

*Non-Delegable Duties:*—The most important qualification of the fellow-servant rule is the doctrine that the master can not so delegate certain of his duties as to escape liability for the non-performance or mal-performance of them.<sup>178</sup> Thus the duties to furnish a safe place to work,<sup>179</sup> to provide safe tools and appliances,<sup>180</sup> to inspect instrumentalities and place of work,<sup>181</sup> to hire competent servants,<sup>182</sup> to warn servants of latent dangers,<sup>183</sup> to instruct them in the performance of new duties,<sup>184</sup> and to exercise proper control and supervision over the work<sup>185</sup> are non-delegable. Nothing short of performance can discharge these duties:<sup>186</sup> it is no defense that the master may have entrusted them to a reliable agent or contractor.<sup>187</sup>

*Vice-principalship:*—A second exception to the rule that a master is not liable to one servant for the negligence of another arises where the servant who committed the fault stands *in loco magistris*, or is a vice-principal. This exception was referred to in the first fellow-servant case in Iowa as being already recognized by the courts of Ohio.<sup>188</sup> It was applied by the Supreme Court of Iowa as early as 1866<sup>189</sup> and has long been the law of this State. It is to be noted, however, in connection with this statement, that the term "vice-principal" is used in a two-fold sense. A servant may be *in loco magistris* by virtue of a rank or authority which makes him the general representative of the master, or by reason of discharging, in the particular instance, a masterial duty.<sup>190</sup> In the latter sense the doctrine of vice-principalship is hardly, if at all, distinguishable from that of non-delegable duties, and it is in this sense only that the doctrine is clearly recognized in Iowa.

There are some Iowa cases which appear to make the question of vice-principalship turn upon the control exercised by the employee whose status is in dispute.<sup>191</sup> Thus a manager who has full direction of the business, or of a particular department or undertaking, is a vice-principal as to acts within the scope of his authority.<sup>192</sup> In a number of cases the authority to hire and discharge is made the test of vice-principalship and it is said that an employee who possesses this authority is not a fellow-servant but a vice-principal.<sup>193</sup> But most, if not all of these cases, can be reconciled with orders which hold that "it is not the rank or grade of employment which determines the character of the service, but the nature of the duty to be performed which gives color to the employee's act."<sup>194</sup> By this second test, an employee who is entrusted with the discharge of a personal, non-delegable duty of the master is, as to such service, a vice-principal, and his negligence is the master's.<sup>195</sup> But a servant, whatever his rank or grade, who undertakes the work of an ordinary employee is, as to such service, a co-servant with others engaged in the same work.<sup>196</sup> This doctrine of dual capacity, whereby the same person may be a vice-principal as to some acts and a co-employee as to others, may now be considered the settled law of Iowa.<sup>197</sup>

Under the doctrine of dual capacity the fact that an employee has authority to direct others at their work does not make him a vice-principal.<sup>198</sup> Hence a mere foreman — that is, a laborer with power to superintend the labor of those working with him — is a co-employee so far as his own labor is concerned.<sup>199</sup> Accordingly, liability for negligence in the discharge of non-masterial duties has been denied when the delinquents were the following: a foreman of car-repairers,<sup>200</sup> a foreman superintending the construction of a house for a contractor,<sup>201</sup> and a machinist who occasionally called other employees to his assistance.<sup>202</sup> On the other hand, recovery was allowed for the negligence of the follow-



ing persons in their supervisory capacity: a section foreman,<sup>203</sup> a mine boss,<sup>204</sup> a boss driver in a mine,<sup>205</sup> a railway yard foreman,<sup>206</sup> a locomotive engineer,<sup>207</sup> and a brakeman temporarily in charge of switching operations.<sup>208</sup> A superintendent, or general foreman, is the proper person to receive complaints of dangerous conditions and to remedy the same; in the exercise of such functions he is a vice-principal.<sup>209</sup> So, also, a master is bound by the negligent command of a servant or agent whom other employees are required to obey,<sup>210</sup> and such a command relieves the servant who obeys it of assumption of risk and of contributory negligence to the same extent as would a command of the master.<sup>211</sup> (See below, p. 63.) In this view, the power to hire and discharge is significant chiefly as showing the authority of the superior servant in question to enforce compliance with his commands.<sup>212</sup>

*Department of Service:*—Expressions are used in certain Iowa decisions which seem to approve the doctrine that only persons associated in the same department of work are co-employees. Thus, it has been held that a bridge-builder is not a co-employee of a train crew upon the same railway line,<sup>213</sup> that a brakeman is not a fellow-servant of a car inspector,<sup>214</sup> and that an inspector of machinery is not engaged in the same service with an operative.<sup>215</sup> None of these cases, however, really turns on the departmental doctrine. Indeed, the Supreme Court has explicitly held that the fact that two servants are engaged in different branches of the common service can make no difference in their rights as against their employer, so long as both are employed in the same general business under one master.<sup>216</sup> The test of common employment in this State appears to be whether or not the negligence of the delinquent servant was a risk (impliedly) contemplated by the injured servant in entering and remaining in his master's service. By this test the

following employees have been held to be co-servants: a machinist engaged in installing a counter-shaft and the operator of a bolt machine notwithstanding that these two were under the direction of different foremen,<sup>217</sup> a track inspector and a locomotive engineer,<sup>218</sup> a sweeper and other employees in a round house,<sup>219</sup> a coal miner and road men employed in the same mine,<sup>220</sup> and a railway detective and the members of a train crew.<sup>221</sup> Probably all the cases which seem to imply the departmental doctrine can be brought under either the doctrine of non-delegable duties or the rule that a servant does not assume a risk of which he has no notice and which could not reasonably have been anticipated at the time of entering his master's service.

*Concurrent Negligence of Master and Fellow-Servant:*—Where negligence on the part of the master is the proximate cause of an injury to an employee, the fact that the wrongful act of another employee coöperated therewith to produce the injury, will not relieve the master of liability.<sup>222</sup> In other words, while the contributory negligence of the injured employee is a bar to recovery, that of a fellow-servant is not. This rule is but a special application of the general principle that where a wrongful act concurs with some other cause and both operate proximately in producing an injury, the wrong-doer will be liable, whether or not the other cause is one for which he is responsible.<sup>223</sup>

*Criticism of the Fellow-Servant Rule:*—The alleged reasons for the fellow-servant rule may be reduced to four:<sup>224</sup> (1) that the employee has the means of knowing and of guarding against the negligence of co-employees;<sup>225</sup> (2) that the risk of injury by the negligence of co-employees is among those "ordinary risks" of his employment which are "impliedly assumed" by the servant in his contract of service;<sup>226</sup> (3) that the rule makes employees watchful of each

other's conduct, and so is a better security against carelessness or incompetence than any liability of the master would be; <sup>227</sup> and (4) that if employees were allowed to maintain actions for injuries caused by the negligence of co-employees, employers would be heavily burdened and investment of capital in industrial enterprises would be curtailed to the detriment of the public.<sup>228</sup>

None of these alleged grounds will bear close scrutiny.<sup>229</sup> The supposition that employees of the same master are necessarily intimate associates, well acquainted with each other's personal habits and constant observers of each other's conduct, might have possessed some plausibility if confined to the servants of a moderate-sized household,<sup>230</sup> or even to the fellow-craftsmen of a petty shop. But, with exquisite irony, the argument drawn from domestic industry was applied without mitigation to railway corporations, with their tens of thousands of employees scattered over half a continent. "Workingmen who had never heard of one another, nor had the faintest relation with one another, were held to be in common employment, and if one was injured by the negligence of the other there was no title to compensation."<sup>231</sup> The very case which has become the chief fountain of fellow-servant wisdom denied indemnity to a locomotive engineer injured by the negligence of a switchman.<sup>232</sup> The earliest Iowa decision was that a track inspector is a fellow-servant of a locomotive engineer.<sup>233</sup>

As was pointed out in an earlier section (see above, p. 22), the "implied contract" argument simply begs the question. Chief Justice Shaw's dictum, "To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved",<sup>234</sup> is at least as convincing when reversed. To say that the master shall *not* be responsible because the damage was caused *to* one of his agents is assuming the very point which remains to be proved.<sup>235</sup> The argument that the negli-

gence of co-employees is an ordinary occupational hazard is equally inconclusive. No doubt, one who engages in a service in which numerous others are employed may reasonably anticipate that his associates will at times be guilty of negligent acts or omissions. But so might he equally expect that his master will sometimes fail of due care and caution. Want of "ordinary care" — as that term is defined by the courts — is a very common failing of mankind. Indeed, the whole train of reasoning which makes the negligence of fellow workmen an ordinary hazard of the employment may be carried over, with scarcely a change of phrase, to the negligence of the employer. To take a single instance, the railway brakeman has as much reason to anticipate that couplings will be out of repair as that engineers will make cross-overs at high speed. Both contingencies are ordinary perils of the employment in the sense of being within the range of every day experience and so of being such as "a reasonably prudent man" would expect to encounter in the course of his service. The brakeman can guard against the one source of danger as well as the other — being powerless to guard against either. The rate of compensation could, in legal presumption, provide for the one risk as well as the other — in point of fact, it provides for neither. In strict logic, then, the servant might be held to contract with reference to the probable negligence of his master as well as with reference to the probable negligence of his co-employees. Evidently, the servant's "implied contract" to assume ordinary risks affords no independent ground for exempting the master from liability for the negligence of his employees, while leaving him liable for his own negligence. At best, the argument under consideration merely recites the rule as a justification for itself.

The contention that the fellow-servant rule promotes the safety of workmen resembles nothing so much as the ingenious theory once propounded by Chief Justice Ruffin of



North Carolina, that the law permits a master to flog his slaves "out of humane regard to the best interests of the slaves themselves." <sup>236</sup> If the fear of death or of mutilation does not avail to make men regardful of their own safety, pecuniary incentives are little likely to affect such a result. The argument overlooks, as well, the obvious considerations on which the rule of *respondeat superior* is grounded: that it is the employer and not the co-employee who effectually controls and directs the acts of employees and who has power to penalize carelessness or incompetence by dismissal from the service. <sup>237</sup>

The argument *ab inconvenienti* need hardly be taken seriously. Capital continues to be invested, and railways, mines, and mills continue to operate in those States and countries that know not the fellow-servant rule. No doubt employers in these jurisdictions are somewhat inconvenienced by their greater liability for work accidents. But, then, it is no small inconvenience to the trainman in a common law jurisdiction that he can have no indemnity for an injury caused by the carelessness of a section hand whom he never saw and over whose actions he had not the smallest control. <sup>238</sup>

The real foundation of the fellow-servant rule is to be sought not in the specious reasoning by which it is bolstered up, but in the conviction of judges that master's liability should be confined to the narrowest possible limits. And most of the criticisms which have in recent years been leveled against the rule by lay and learned alike spring from a shifting of social values whereby the interests of capital have come to hold a lower, and human life and happiness a higher, place in men's esteem. <sup>239</sup>

*Statutory Modification of the Fellow-Servant Rule:—*  
A radical innovation upon well settled legal principles, which has such slight foundations in reason or justice <sup>240</sup>

and which works such hardship upon a very numerous and necessitous class, has, of course, not passed unchallenged by statesmen or unnoticed by legislatures. The character of the fellow-servant rule as a piece of judicial legislation has long been recognized. Said Mr. Birrell, late Secretary for Ireland, speaking in the House of Commons in 1897: "The doctrine [of common employment] was only invented in 1837. Lord Abinger planted it; Baron Alderson watered it, and the devil gave it increase." <sup>241</sup> The British Home Office reported to the Royal Commission on Labour in 1894 as follows:

The doctrine is an exception to the general rule; is modern judge-made law; implies a contract founded on a legal fiction not in accordance with fact; has been pushed to extreme length by the judges' forcing and straining the meaning of the term 'common employment' and in practice leads to gross anomalies and injustice. . . . The law . . . is an unfair law, operating oppressively against workmen as a class.<sup>242</sup>

Even the courts now very generally recognize the injustice and unwisdom of the rule <sup>243</sup> and welcome the modification or abrogation of it by legislation.<sup>244</sup>

The defense of common employment has, accordingly, been swept away by statute in Great Britain and has been abrogated by a few American legislatures <sup>245</sup> and more or less modified by nearly all of them.<sup>246</sup> Most of the American fellow-servant statutes are limited in application to railways, partly because the common law rule has even less justification in railway transportation than in most other industries, partly because accidental injuries to railway workers are so shockingly numerous, but most of all, perhaps, because legislators are less tender of railway than of other industrial interests. Railways are notoriously unpopular with farmers and small business men, and a law adversely affecting railway investors directly touches but a

small number of voters. A general fellow-servant statute, on the contrary, would arouse wide-spread antagonism, and is not likely to be enacted except where the "labor vote" is a decisive factor in politics.

*The Iowa Railway Liability Act:*—The fellow-servant statute of Iowa, as of most American Commonwealths, is confined to railways, and, indeed, by judicial interpretation to certain railway hazards. The statute has a history of half a century, having been first enacted in 1862, only two years after the doctrine of co-service was adopted by our Supreme Court. The first act was as follows:

Every rail-road company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employees of the corporation to any person sustaining such damage.<sup>247</sup>

The words "all contracts to the contrary notwithstanding" were added in 1870.<sup>248</sup> In 1872 the liability was extended to the wilful wrongs of agents and employees when such wrongs were in any manner connected with the use and operation of the railway.<sup>249</sup> In the *Code of 1873* these three acts were combined into one section which reads:

Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.<sup>250</sup>

Judicial construction of the railway liability act began in 1866 and has continued to the present day. It will be con-



venient, however, to discuss the questions which have arisen in logical order as presented by the statute rather than to trace the historical development of judicial interpretation.

First. In Iowa all the duties and liabilities imposed by law upon "corporations owning or operating railways" apply to every person, firm or corporation that owns or operates a railway.<sup>251</sup> Accordingly, the liability law has been held to apply to a lessee,<sup>252</sup> to a receiver,<sup>253</sup> and to a railway construction company which moves trains upon the track in furtherance of its work.<sup>254</sup> The statute does not apply to street railway companies,<sup>255</sup> though interurban railways were brought within its provisions in 1902.<sup>256</sup>

Second. The constitutionality of the railway liability law has been repeatedly attacked in the courts, but without success. As originally enacted the liability provision was a section of "An Act in relation to the duties of Railroad Companies." In the first case which arose under this statute, that of *McAunich vs. Mississippi and Missouri Railroad Company* (20 Iowa 338), decided in 1866, it was contended that this title did not cover provisions relative to the *liabilities* of railroad companies within the meaning of that section of the State Constitution which requires that "Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title."<sup>257</sup> The Supreme Court held this objection to be not well taken. "Every law", it was said, "prescribing *duties* must have the sanction of *liabilities* resulting from a failure to perform those duties, in order to have any practical beneficial effect or operation."<sup>258</sup>

The burden of the attack upon the constitutionality of the statute has been that it is class legislation. Thus, it has been argued that the act violates the State Constitution in that it is not uniform in operation, and in that it grants privileges and imposes liabilities which are not extended upon the same terms to all citizens of the State;<sup>259</sup> and that

it contravenes the Fourteenth Amendment to the Constitution of the United States by depriving railway companies of the equal protection of the law.

The objection that the statute is not uniform in operation was disposed of in the McAunich case above cited. The Court said:

It [the statute] applies to all railroad corporations now in existence, or which may hereafter exist, and is just as general and uniform as it would be if it applied to all common carriers. . . . Very many laws, the constitutionality of which are [is] not doubted, do not operate alike upon all citizens of the State. . . . These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for, is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.<sup>260</sup>

A similar line of reasoning answers the contention that the act violates the constitutions of Iowa and of the United States by subjecting railroad corporations to penalties and liabilities to which other persons and corporations engaged in a like business are not subjected. For, it was said, the business of operating a railway is peculiarly hazardous, and as the statute extends to all persons or corporations engaged in operating railroads it does not discriminate in favor of or against anyone. It is a pure question of legislative discretion whether like penalties and liabilities should be applied to carriers by canal or stage coach, or to persons and corporations using steam in manufactories.<sup>261</sup>

Finally, the act when rightly construed does not grant to railway employees any privileges or immunities which are not open on the same terms to all persons in the same situation.<sup>262</sup> In reaching this conclusion, however, the State Supreme Court, held that the act must be so construed as to

embrace, not all railway employees, but only those engaged in the hazardous business of operating railroads. "When thus limited", said the Court, "it is constitutional; when extended further it becomes unconstitutional."<sup>263</sup> The reasoning was that the statute if applied to all persons in the employ of railroad corporations, would secure privileges to certain persons — section hands, for example — which are denied to others engaged in equally perilous callings. The effect of this interpretation is materially to narrow the scope of the original statute, the terms of which had included all railway employees.

Beaten in the highest State tribunal the railways carried the "due process" and "equal protection of the law" questions to the Supreme Court of the United States, which sustained the decision of the Court below.<sup>264</sup> The Federal tribunal was, of course, powerless to widen the construction of the statute adopted by the State Court. It may be doubted, however, in view of subsequent decisions of the United States Supreme Court, whether so narrow a construction was necessary to save the statute from the inhibitions of the Fourteenth Amendment. That Court has not only upheld legislation abrogating the fellow-servant rule as to railway employees generally,<sup>265</sup> but has construed an Indiana act, apparently similar in scope to the Iowa statute of 1862, so as to embrace all railway employees.<sup>266</sup> A similarly broad interpretation of the Iowa statute would probably have been sustained. Indeed, the reasoning by which the Iowa Supreme Court justified its narrow interpretation of the fellow-servant law was met and refuted by the highest court of the land in construing the Indiana act above referred to.<sup>267</sup>

The court of last resort having decided that the railway liability act does not apply to all casualties sustained in railway service it became important to determine precisely what injuries fall within its scope. The act of 1862 was held

to apply to servants employed for the discharge of duties which exposed them to the peculiar hazards incident to the operation of railways. Under this rule, apparently, an employee would have been entitled to recover for an injury which did not arise from the peculiar hazards of railway operation so long as his employment embraced those hazards.<sup>268</sup>

The act of 1872 introduced a new element into the railway liability statute in the proviso, "when such wrongs [of employees] are in any manner connected with the use and operation of any railway, on or about which they shall be employed". The Supreme Court has held that the words "such wrongs" in this clause refer to negligent acts as well as wilful wrongs, and that, consequently, recovery under the statute can be had only for injuries arising from "the use and operation of any railroad".<sup>269</sup>

The phrase, "use and operation of a railway", is judicially defined as referring only to the "handling of railroad machinery moved upon railroad tracks".<sup>270</sup> Justice Beck, speaking for the Supreme Court, remarked in a leading case: "What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movements of trains."<sup>271</sup> But the word "trains" as here used must be understood to include all railroad machinery moved upon railroad tracks, as a work train,<sup>272</sup> a steam shovel mounted upon a car and operated by being moved along the track,<sup>273</sup> a single locomotive,<sup>274</sup> or even a hand car.<sup>275</sup> The rails on the floor of a machine shop, however, are not a railway and the movement of an engine thereon is not the use and operation of a railway.<sup>276</sup>

Under this interpretation it is not the nature of the employment but the cause of the injury which determines the applicability of the statute.<sup>277</sup> There are, indeed, some de-



cisions to the effect that the benefits of the statute accrue only to such employees as are engaged, at the time of receiving the injury, in the business of operating a railroad.<sup>273</sup> But a majority of the cases hold that any employee is within its protection while engaged in the performance of a duty which exposes him to hazards peculiar to the operation of a railway.<sup>279</sup> The following judicial statement may be taken as an authoritative interpretation of the scope of the statute:

If, then, the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection.<sup>280</sup>

A few concrete cases in which recovery has been allowed or denied will serve further to elucidate the effect of the statute.

First. All persons employed in the actual operation of trains are within the statute as a matter of course.<sup>281</sup> The essential questions in cases where members of train crews were injured in the course of duty are whether the co-servant was in fact negligent and whether the injured employee was himself at fault.<sup>282</sup>

Second. Persons employed upon a train, though having nothing to do with its management. A laborer employed in the working of a ditching machine operated by moving along the track the train of which it formed a part, is a member of the train crew.<sup>283</sup> The same rule applies to a shoveler upon a gravel train,<sup>284</sup> and to a laborer who rides upon a train and alights from time to time to clear the track of snow.<sup>285</sup>

Third. Employees working on or about a "live" engine. An employee engaged in coaling a "live" engine,<sup>286</sup> in

coupling tanks together,<sup>287</sup> or in operating a turn table,<sup>288</sup> is exposed to perils peculiar to the operation of a railway and can recover for injuries due to the negligence of a co-employee in the same service.

Fourth. Employees at work upon a car which forms a part of a train, or is likely to be moved by the operation of trains. A car inspector whose duty requires him to go beneath all cars,<sup>289</sup> a car repairer injured by a moving engine when at work in a railway yard,<sup>290</sup> a car cleaner at work in a standing car which was moved by the impact of a locomotive,<sup>291</sup> and a mechanic injured while repairing one of the cars of a train,<sup>292</sup> were each held to be within the protection of the statute.

Fifth. Employees exposed to the peril of passing trains while in the performance of their duty are within the statute. This rule has been applied to a railway detective rightfully walking along the track,<sup>293</sup> to a water carrier for a bridge gang,<sup>294</sup> and to section men engaged in track repairing<sup>295</sup> — of course only where the injury was due to the negligence of persons employed in the operation of trains.

Sixth. Section men riding upon a hand car.<sup>296</sup> On the other hand, employees in the following situations have been held not to be engaged in the operation of a railway so as to make the company liable for the negligence of a fellow-servant engaged in the same sort of work: employees in a railway machine shop,<sup>297</sup> employees engaged in hoisting coal in a railway coal house,<sup>298</sup> sweepers in a round house,<sup>299</sup> men repairing a "dead" engine,<sup>300</sup> a section hand repairing the track,<sup>301</sup> and men loading a detached car.<sup>302</sup>

As to all cases not embraced in the statute, the common law rule exempting the employer from liability to one employee for the negligence of another is still in force.<sup>303</sup> Even as to cases within its terms the statute does not change the degree of care due from a master to his servant;<sup>304</sup> nor did



it, prior to the act of 1909, affect the defense of contributory negligence.<sup>305</sup>

Ordinarily the character of the servant's employment, the cause of his injury and whether or not thereby the employee is brought within the provisions of the statute are questions of fact for the jury and not of law for the court.<sup>306</sup> But where there is no dispute in the evidence upon these propositions the court may instruct the jury as to whether or not the case comes within the statute.<sup>307</sup>

The clause in the railway liability act reading "no contract which restricts such liability shall be legal or binding" has been attacked as an unconstitutional interference with "freedom of contract". The Supreme Court of Iowa in overruling this contention remarked:

There is no such thing as absolute liberty of contract. Indeed, all personal and property rights are subject to proper legislative regulation and control. . . . A very great proportion of our legislation is a restriction upon some one's liberty. Indeed, the liberty of which we boast and are so justly proud is liberty under law, and not absolute license. It is freedom frequently restrained by law for the common good.<sup>308</sup>

In pursuance of the foregoing decision an agreement entered into by a railway employee at the time of his employment that if he sustains any personal injury for which he makes a claim against the company for damages, failure to give notice thereof in writing within thirty days after injury is sustained shall be a bar to action therefor, was held to be invalid.<sup>309</sup> None the less an effective device for contracting out of the statute, in spite of the contracting out clause, was hit upon by the Burlington Railway.

This device took shape in the Burlington Voluntary Relief Department, organized in 1889. The employees who became members of this department agreed to allow the company to deduct a specified sum from their monthly wages

for the creation of a relief fund. The company on its part undertook to care for the fund, to defray all administrative expenses, and to guarantee the payment of the stipulated benefits. The essential feature of the plan, in the present connection, is the agreement on the part of members that the acceptance of any benefit thereunder for personal injuries sustained in the service of the company should operate as a release of all claims against the company in respect of such injuries, and further that the bringing of a suit against the company should forfeit all rights under the relief plan.<sup>310</sup>

It was claimed by the company that the department was wholly beneficent in purpose, that membership therein was purely voluntary, that the company bore about one-third of the total cost of relief thereunder (including administrative expenses), and that the scheme avoided the wastes of litigation, secured prompt relief in cases of sickness or injury, made equitable provision for deserving cases, and tended to promote good will between the company and its employees. The employees, on the contrary, asserted that membership in the department was practically compulsory, at least for trainmen; that the relief fund consisted, in larger part, of deductions from wages; that the acceptance of benefits took place at the time when the injured employee was seriously in need of aid and was easily induced to waive his right of action in return for immediate relief; and, finally, that the provision which made the acceptance of relief out of funds contributed by the employees themselves a bar to any action founded on the company's negligence transferred to the employees a portion of that liability for personal injuries which ought to rest upon the company to insure reasonable care for the safety as well of the travelling public as of railway employees.<sup>311</sup>

Without passing upon the merits of all these respective assertions, it is clear from the very terms of membership

that members of the organization practically became their own insurers against work accidents however caused. In other words, the Voluntary Relief Department operated to relieve the company of its liability under both common and statute law.

The stipulations above recited were held by the Supreme Court of Iowa, in 1895, not to be a contract restricting the liability of the company in violation of the acts of 1870 and 1873. The theory of this decision is (1) that the employee by entering the relief department has waived his right of action for a valuable consideration and (2) that the effect of the contract of membership is but to put the employee to his election, after injury, between his right of action and his rights as a member of the department.<sup>312</sup> This theory overlooks the possibility that both the contract and the election might be involuntary in fact, and hence for a consideration not deemed adequate by the employee.

At any rate, the Court's decision was felt to be, in effect, a judicial repeal of a legislative enactment. It was believed that under this decision it would be possible for every railway company to defeat the purpose of the liability law by making membership in a relief association a condition of employment. Accordingly, the railway unions at once began agitating for a law which should expressly invalidate contracts such as those used upon the Burlington system. The views of the railway workers were embodied in an amendment to the railway liability statute which was offered by Representative Temple at the special legislative session of 1897,<sup>313</sup> and which has come to be known as the Temple Amendment. The proposed amendment having failed of passage at the special session,<sup>314</sup> the unions "took the question to the people" and secured the endorsement of the principle for which they were contending by both the Republican and Democratic State conventions of 1898.<sup>315</sup> An act embodying that principle was accordingly passed at the

next session of the General Assembly (1898) with but little opposition.<sup>316</sup> The Temple Amendment as finally enacted reads:

Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received.<sup>317</sup>

The validity of the Temple Amendment as an exercise of police power has been fully upheld by the supreme courts both of Iowa and of the United States.<sup>318</sup> Its effect is to invalidate the Burlington Voluntary Relief Department contracts so far as these undertake to restrict the liability of the railway.

After the passage of the Temple Amendment, in 1898, the railway liability act stood unchanged until the act of 1909 modifying the common law in respect to contributory negligence and assumption of risk — topics elsewhere treated in this monograph.

#### CONTRIBUTORY NEGLIGENCE

Proof that a work injury was occasioned by the fault of the employer is of no avail unless the plaintiff can also establish his own freedom from contributory negligence.<sup>319</sup> For no one can, at common law, hold another liable in damages for an injury to which his own want of ordinary care in any degree proximately contributed.<sup>320</sup> It matters not that the fault of the workman may have been slight and that of the master gross by comparison: any negligence on the



part of the person injured, which actually contributed to produce the injury and without which the accident would not have occurred, will defeat recovery.<sup>321</sup> But negligence which was not a proximate and efficient cause of the injury complained of is not to be regarded as contributory;<sup>322</sup> hence the injured party, though not entirely without fault, may maintain an action if he could not have prevented the injury by the exercise of ordinary care.<sup>323</sup>

Lastly, even the contributory negligence of the person injured is not a bar to recovery where the other party to the accident became aware of such negligence in time to avoid the injury by the use of ordinary care.<sup>324</sup> This doctrine of "the last clear chance",<sup>325</sup> like the preceding apparent exception to the general rule of contributory negligence, appears to be founded on the theory of proximate cause: the negligent act or omission of the defendant intervening between the negligence of the injured party and the injury is considered the sole proximate cause of the latter.<sup>326</sup>

As applied in employers' liability cases the doctrine of contributory negligence presents two aspects. First, an employee may be guilty of contributory negligence so as to preclude recovery in continuing to work under conditions of such imminent hazard as a reasonably prudent man would refuse to encounter.<sup>327</sup> Second, a servant can not recover for an injury to which his own want of due care at the time of the accident contributed as an efficient cause. In Iowa, however, the conception of contributory negligence in continuing at work is merged with that of assumption of risk<sup>328</sup> — which will be discussed in a subsequent section.<sup>329</sup> It only remains, therefore, to consider the question of the servant's negligence at the time of the injury.

The care exacted of an employee is that defined as "reasonable" or "ordinary",<sup>330</sup> though what conduct is reasonable will, of course, depend upon the particular circumstances surrounding each case.<sup>331</sup> Thus the standard of

care varies with the age and experience of the employee:<sup>332</sup> reasonable care on the part of a child or young person is only such care and discretion as is usual with persons of similar age.<sup>333</sup> So, too, the need of performing a duty in haste,<sup>334</sup> or under conditions of imminent peril or necessity,<sup>335</sup> or the engrossment of the employee's attention by the duties in which he is engaged,<sup>336</sup> will excuse acts that would be negligent if performed under normal conditions.

Contributory negligence is not predicable unless the employee was, or ought to have been aware of the conditions which produced his injury,<sup>337</sup> and appreciated the dangers created by those conditions.<sup>338</sup> The employee has a right to rely on the presumption that both his employer and his co-employees will exercise due care in the discharge of their respective duties, and is not bound to take precautions against their failure so to do unless he has notice thereof.<sup>339</sup> Knowledge of a dangerous condition will, however, be imputed to the injured employee if he could have discovered the same by the exercise of ordinary care.<sup>340</sup> Whether, in a given case, the employee can be held to have appreciated the dangers to which he was exposed will depend upon the age and experience of the employee,<sup>341</sup> his means of observation,<sup>342</sup> and other circumstances existing at the time of the injury.<sup>343</sup>

Contributory negligence is ordinarily a mixed question of law and fact,<sup>344</sup> but may be conclusively presumed as a matter of law whenever it is an unavoidable inference from the undisputed facts of the case.<sup>345</sup> Typical instances of conduct which has been held to present such an inference are: failure to look for possible dangers;<sup>346</sup> forgetfulness of a permanent structure, the position of which should have been known;<sup>347</sup> going into, or remaining in, an unauthorized and dangerous place;<sup>348</sup> creating or assisting to create the conditions from which the injury results;<sup>349</sup> or going into a



dangerous place without notifying persons from whose acts danger may reasonably be anticipated.<sup>350</sup>

Violation of law is negligence *per se*,<sup>351</sup> and where such violation by the injured party contributed to the injury complained of he can not recover. But if the violation of law was a mere condition, and not the proximate cause of the injury, it will not defeat recovery.<sup>352</sup>

The needless violation of a known rule of the employer intended for the safety of his employees is contributory negligence, if it is an efficient cause of the injury.<sup>353</sup> Of course, a breach of the rules will not defeat recovery when it was not the proximate cause of the injury,<sup>354</sup> nor when the breach was justified by the circumstances.<sup>355</sup> Nor can an employer escape responsibility by showing the violation of a rule which is habitually disregarded with his apparent acquiescence.<sup>356</sup>

It is not necessarily negligent to adopt the more hazardous of two available courses of action. The question usually is one of fact, to be determined according to the circumstances of the case, the reasons for doing what was done, and the care used to avoid danger.<sup>357</sup> But to choose a reckless or needlessly dangerous method of accomplishing an object is negligence as a matter of law.<sup>358</sup> Thus, a brakeman is not always guilty of contributory negligence in going between cars while in motion to couple or uncouple them.<sup>359</sup> Nor is a servant necessarily negligent in failing to use a safety appliance provided by the employer,<sup>360</sup> though it is negligent to ignore such an appliance where it can reasonably be used.<sup>361</sup> Lastly, the fact that a particular act is usual or customary tends to rebut a presumption of negligence,<sup>362</sup> unless the custom is itself negligent.<sup>363</sup>

Contributory negligence is not a defense of the master, to be established by him: freedom from such negligence must be pleaded and proven by the employee to justify recovery.<sup>364</sup> It is not always necessary, however, to prove the absence

of contributory negligence by direct and positive testimony.<sup>365</sup> The fact of due care may sometimes be inferred from the circumstances attending the injury,<sup>366</sup> or from the instinct of self-preservation.<sup>367</sup> Thus, in case of an injury causing death it may be presumed, until the contrary appears, that the deceased, prompted by his natural instinct, exercised such care for his safety as was required under the circumstances.<sup>368</sup> But the presumption arising from the instinct of self-preservation only obtains in the absence of direct evidence as to the care exercised by the person injured at the time of the injury.<sup>369</sup>

*Criticism of Contributory Negligence:*—The rule which makes the smallest inadvertence on the part of the injured person a complete bar to recovery bears with peculiar hardship upon industrial wage-workers. The statisticians of the Imperial Insurance Office estimate that not less than forty per cent (41.26 per cent in 1907) of work accidents in the German Empire are attributable to the fault of the injured workmen, within the common law definition of contributory negligence.<sup>370</sup> Such a record convincingly demonstrates the impossibility of incorporating the rule under discussion in any adequate system of indemnity for industrial injuries, since its operation would leave some two-fifths of such accidents unindemnified.

The doctrine of contributory negligence not only defeats recovery in a large proportion of employers' liability cases; it is substantially unjust even as a part of an indemnity system based on fault. Statistics of work accidents, of which those above quoted are fairly representative,<sup>371</sup> contain abundant proof that negligence, in the sense of occasional lapses of that care and watchfulness which are the only human traits of the "reasonably prudent man", is a very common failing. The prevalent shortcoming of industrial workmen in this respect is due partly to a conceptual juris-

prudence which makes the conduct of a hypothetical "reasonable man", rather than of actual human beings, the standard of due care; and partly to conditions which inhere in modern industry.

The "reasonable man" of the common law never relaxes his vigilance under the influence of monotony, fatigue, or habituation to danger, never permits his attention to be diverted, even for a moment, from the perils which surround him, never forgets a hazardous condition that he has once observed, and never ceases to be on the alert for new sources of danger. Evidently, this personage, like the "economic man" of John Stuart Mill, has no flesh-and-blood existence, but is a heritage from pre-scientific psychology.

The unreasonableness of the "reasonable man" standard of care is well exhibited in its application to extra-hazardous employments. In the nature of the case such callings are followed by men of unusual daring — which is to say, of less than usual regard for their own safety. Moreover, all experience shows that long continued exposure to danger begets indifference thereto.<sup>372</sup> Accordingly, acts which would be deemed reckless in less hazardous employments are but incidents of the day's work to a railway brakeman or a structural iron-worker. To the common law jurist these well-known facts suggest only that a special presumption of negligence should lie against the members of these trades.<sup>373</sup> But this is so only because "ordinary care", as defined by the courts, is something different from the usual practice of men under the actual circumstances to which the test of care is to be applied. The ordinary man is not "ordinarily prudent" in the eye of the law, just as no actual business community is fully "normal" in the view of orthodox economists.

Another very large class of so-called negligent acts is accounted for by the mal-adjustment of human nature to a mechanical environment.<sup>374</sup> The high speed of modern in-

dustrial processes, the ceaseless din amidst which they are carried on, the excessive hours in many employments, the difficulty of focusing attention upon a monotonous and incessantly recurring operation, impose a strain upon industrial operatives which makes occasional inadvertence on their part as inevitable as it is disastrous.

In short, "it is coming to be well understood by all who have studied the circumstances of modern industrial employments that the supposed contributory negligence of employees is in effect the result of the mechanical conditions imposed on them by the nature of their employment, and that by reason of these conditions the individual vigilance and responsibility contemplated by the common law are impossible in practice."<sup>375</sup>

To these mechanical causes of contributory negligence must be added others for which the individual workman is no more responsible than for the conditions under which he works — the ignorance of "green" hands or of tongue-tied immigrants, the horse-play and mischief of children and young persons, and the physical defects which do not keep the victims out of dangerous trades but which do render them peculiarly liable to injury.<sup>376</sup>

Thus, the investigators of the Pittsburgh Survey found that of 410 fatalities, 22, or five per cent, were due to the ignorance or unskillfulness of "greeners"; 13, or three per cent, were due to the extreme youth of the victims; 8, or two per cent, to intoxication; 4, or one per cent, to physical weaknesses; 22, or five per cent, to sheer heedlessness; and 83, or twenty per cent, to momentary inattention, more or less excusable by the circumstances, or to the deliberate taking of chances in order to save time and avoid effort.<sup>377</sup> Of 132 fatalities attributable to the victims' "fault", in the common law sense, no more than 85 were due to "heedlessness, inattention, or recklessness", and a considerable number,



even of these 85, must be explained by the high speed of the work and by the workers' habituation to danger.

The common law doctrine of contributory negligence is, then, defective in that it fails to take account of men as they are. A practical science which has to do with the ordinary relations of everyday life ought not to be based on the unreal abstractions of an antiquated psychology. If "contributory negligence" is to bar recovery for a work accident, "negligence" should be defined as failure of that care ordinarily practiced by men of the same calling under circumstances similar to those of the case at bar.

The logical foundations of the rule under discussion are hardly more secure than the psychological assumptions which gave birth to the "reasonable man". The rule can not be based on the doctrine of proximate cause, for there are numberless cases where the contributory negligence of the plaintiff was no more a proximate cause of the injury than was the fault of the defendant.<sup>378</sup> It can not be grounded on the fact that the defendant's negligence in such cases is not the sole efficient cause of the injury, since the concurrence of another cause never relieves a wrong-doer from the consequences of his own fault.<sup>379</sup> Nor will it do to say that recovery is not allowed because the law will not undertake to determine which of two wrong-doers is most at fault<sup>380</sup> — the injured person is not a wrong-doer, since no man owes a legal duty of protection to himself.<sup>381</sup>

Lastly, the doctrine of contributory negligence can not be justified by the unfitness of a jury to apportion damages to the degree of fault.<sup>382</sup> If juries can be trusted to determine the nice questions of contributory negligence, assumption of risk, and fellow-servant or vice-principal, they can discharge this further duty also. In point of fact, the present rule rests upon no other basis than the general individualism of the common law — whereof it is, indeed, one of the most extreme expressions.<sup>383</sup> No man owes any duty to another be-

yond that of affording him the opportunity to protect himself. If, therefore, the injured person could have prevented his injury by the exercise of ordinary care he is not allowed to recover.

The day when the social philosophy of *laissez faire* was a sufficient authentication of juristic principles that have to do with practical affairs lies some two generations in the past. Accordingly, as changed industrial conditions have made the common law rule of contributory negligence more and more oppressive in operation, there has appeared a vigorous and widespread demand for the modification of that rule.

*Statutory Modification of Contributory Negligence:*—In response to this demand, statutes affecting the law of contributory negligence have been enacted by fifteen States, by the District of Columbia, and by the United States. These statutes are of three types. (1) In Indiana contributory negligence is made an affirmative defense, to be pleaded and proven by the employer.<sup>384</sup> (2) In six States contributory negligence is not a bar to recovery where the violation by the employer of specified safety laws is the ground of action.<sup>385</sup> (3) The rule of proportional negligence, borrowed from admiralty law,<sup>386</sup> whereby want of care on the part of the person injured does not defeat recovery, but only effects a reduction of damages proportionate to such want of care,<sup>387</sup> is established as to all employments in Ohio<sup>388</sup> and the District of Columbia,<sup>389</sup> as to mines, smelters, and ore mills in Nevada,<sup>390</sup> as to coal mines and clay works in Maryland,<sup>391</sup> as to building operations in Oregon,<sup>392</sup> and as to railways by nine States<sup>393</sup> and by the United States.<sup>394</sup>

The Iowa statute, dating from 1909, is restricted to railway employees and combines the types numbered (2) and (3) above. The text of the act is as follows:



That in all actions hereafter brought against any such corporation [operating a railway] to recover damages for the personal injury or death of any employe under or by virtue of any of the provisions of this section, [*Code of 1897*, Section 2071, the railway liability statute] the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier or corporation of any statute enacted for the safety of employes contributed to the injury or death of such employe.<sup>395</sup>

This act has not yet been construed by the courts. There is little doubt, however, that, as part of the Railway Liability Statute, the Contributory Negligence Act applies only to injuries arising from the peculiar hazards of railway operation<sup>396</sup> and that railway companies can not contract out of their liability under the act. To employees within its provisions the new legislation is probably at least as important as the fellow-servant act already noticed. If anything, the common law rule of contributory negligence barred recovery in a larger number of railway accidents than the fellow-servant rule.

#### ASSUMPTION OF RISK

When the plaintiff in an employers' liability action has made out his case, when it clearly appears that the injury was caused by a condition for which the employer was responsible, and was in no way contributed to by the fault of the injured employee, the master may still, at common law, escape liability by setting up the curious contention that the employee had "assented" to the negligence, and "assumed" the risk, and "waived" his right to recover. Not that the employee had consciously agreed to release his master from the obligation to use ordinary care for his safety. But be-

cause he had continued at work knowing that the employer was negligent in the particular respect that caused his injury the law implies that the employee assumed the risk of being injured thereby.<sup>397</sup> For, it is reasoned, the employee is free to quit the service of a master who will not remedy a dangerous condition.<sup>398</sup> If, then, knowing the danger, he chooses rather to encounter it than to seek other employment, he is barred from recovery under the ancient maxim, *volenti non fit injuria* (that to which one assents is no wrong).<sup>399</sup>

The "assumption of risk" herein considered is to be sharply distinguished from so-called "assumption of ordinary risks", on the one hand, and from contributory negligence, on the other. The "ordinary risks of the employment" are assumed by the servant in the sense that an injury arising therefrom, not being attributable to the master's negligence, affords no ground of action. The "extraordinary risks", on the contrary, are, by definition, those for which the master is *prima facie* responsible.<sup>400</sup> The servant's assumption of these risks, therefore, operates to relieve the master of liability for an admitted wrong.<sup>401</sup> Contributory negligence, again, refers to the conduct of the injured person at the time of the injury; assumption of risk refers to continuance at work with knowledge of a condition which menaces injury at an indeterminate time. Hence a workman may be debarred from recovery by his assumption of the risks that occasioned his hurt, notwithstanding he was exercising all due care at the time of the accident. Conversely, he may be non-suited for contributory negligence in respect to a risk that he had not assumed.<sup>402</sup>

Assumption of extraordinary risks is an affirmative defense which must be pleaded by the master and sustained by a preponderance of evidence.<sup>403</sup> To make good his contention on this issue the employer must prove (1) that the employee knew, or in the exercise of ordinary care should

have known, of the defect which occasioned his injury;<sup>404</sup> (2) that he appreciated the extra hazard resulting therefrom;<sup>405</sup> and (3) that with such knowledge and appreciation he continued at work, exposed to such abnormal hazard, without any special inducement so to do, other than unwillingness to join the army of the unemployed.<sup>406</sup>

Actual knowledge of the dangerous condition need not be shown in order to charge the employee with assumption of the risk, since every person is held, in law, to know what, in the exercise of ordinary care, he ought to know.<sup>407</sup> Ordinary care requires the employee to use reasonable diligence to discover the open and obvious dangers around him,<sup>408</sup> and he is chargeable with knowledge of any danger which it would have been possible to discover by the exercise of such care as persons of ordinary intelligence may be expected to take for their own safety.<sup>409</sup> But he is not required to inspect or search for obscure dangers or defects in his place of work, or in the machinery or appliances which are furnished to him.<sup>410</sup> Whether an employee is chargeable with knowledge and appreciation of a particular risk will depend upon his age and experience,<sup>411</sup> his opportunities for acquaintance with his surroundings,<sup>412</sup> the means of information at his command,<sup>413</sup> and the obviousness of the danger to which he is exposed. A minor is not as a matter of law incapable of assenting to, and assuming the risk of, a hazard created by the negligence of his employer.<sup>414</sup> But the age and experience of the employee are always important considerations in determining whether he knows or ought to know and appreciate the peril to which he is exposed.<sup>415</sup>

An employee is chargeable with knowledge and appreciation of all dangers which are open and obvious,<sup>416</sup> that is to say, discoverable by the exercise of reasonable care.<sup>417</sup> A bridge above a railway track too low to be cleared by a brakeman standing on the top of a box car,<sup>418</sup> a projecting girder in an elevator shaft,<sup>419</sup> or a coal chute in close prox-

imity to a railway track <sup>420</sup> present dangers which must be patent to any person of ordinary intelligence. But where the risk is not apparent it is not assumed unless there are circumstances showing that it should have been appreciated. <sup>421</sup>

Assumption of risk relieves the master of all liability for the non-discharge of his common law duties. Recovery is thus barred for failure to provide a safe place to work <sup>422</sup> or safe machinery <sup>423</sup> and appliances, to hire competent servants, <sup>424</sup> or to conduct the business on a safe system. <sup>425</sup>

The law is less clear with reference to statutory duties of the master. It appears to be settled that a servant may "consent" to his violation of a statute not expressly enacted for the protection of employees, <sup>426</sup> as an ordinance regulating the speed of railway trains within the corporate limits of a city. <sup>427</sup> But it is not easy to reconcile the decisions under the safety laws proper.

Under the act forbidding the employment of children to operate machinery it was held, in 1907, that children within the prohibited age are presumptively incapable of appreciating the dangers, and assuming the risks, attendant upon such employment. "Public policy", it was said, "would seem to demand that the statute which undertakes to protect children against the hazards to which the recklessness and inexperience of childhood expose them shall not be defeated of its purpose by pleading that same childish recklessness and ignorance as a reason for exempting an employer from responsibility for his own wrong." <sup>428</sup> With respect to adults it was held in 1907 that an experienced bakery operative may assume the risk of being injured by an unguarded dough-mixer notwithstanding that the factory acts require such machinery to be guarded. <sup>429</sup> Four years later, however, the Supreme Court explicitly held that where the negligence charged constitutes the violation of a statute expressly enacted for the servant's benefit the master can not avail him-



self of the plea of assumption of risk against the consequences of his own wrong. Said Mr. Justice Weaver, speaking to this point:

To say that the Legislature in enacting these measures of protection which in some degree equalize the advantages of employer and employé and afford a needed protection to the persons and lives of the latter intended that the master might violate the statute to the injury or death of his servant, and then escape liability by pleading and proving that his offense against the law was habitual, obstinate and notorious, is inconsistent with justice and, it is hardly extravagant to say, repugnant to good morals. Such a rule offers a premium to contemptuous disregard of the statute, and robs it substantially of all value to the class in whose interest it was enacted.<sup>430</sup>

In the opinion last cited the bakery case of 1907 was construed as turning on the contributory negligence of the injured employee which left the servant's assumption of risk from the master's violation of a safety statute an open question.<sup>431</sup> But, though the later decision was evidently intended to establish a controlling precedent, the same court in the same term held that a laundry worker did not assume the risk created by the absence of a guard upon a mangle at which she was employed, not because the failure to provide a guard was a violation of the factory act, but because, being inexperienced, she was not chargeable with knowledge that such a guard was practicable, nor with appreciation of the extra hazard arising from its absence.<sup>432</sup> Later still, the Court, reverting to the more humane view, has decided in several cases that an employee does not assume the risk of a violation of the safety laws, although he knows of such violation and appreciates the danger incident thereto.<sup>433</sup>

It may be concluded, therefore, that the law in Iowa now is that an employee can not in any case assume the risk of, or "consent to", his employer's violation of a statute enacted expressly for the safety of employees. This doctrine is cer-



tainly more humane than the opposite view, and it seems also to be better supported by the decisions in other jurisdictions.<sup>434</sup> The rule which negatives assumption of risk in every such case has the further advantage of avoiding the great uncertainty and the numerous appeals which must result from making assumption turn on the particular facts of each case.<sup>435</sup>

Even in actions founded solely on the common law, assumption of risk may be negated by an affirmative showing that the servant was justified in continuing at work, although he knew and appreciated the danger to which he was exposed by reason of his master's negligence. Such justification may be afforded by several circumstances.

First. An employee does not assume a risk of which he only becomes aware at the moment of his injury. No one is properly chargeable with knowledge of a peril unless, in the exercise of reasonable care, he might have become aware of it sufficiently in advance to enable him to protect himself therefrom.<sup>436</sup> Moreover, it would be unreasonable to require an employee to abandon his master's service the instant he discovers a dangerous condition. He may wait a reasonable time to see whether, upon complaint, the danger will be removed; and during such time he is not chargeable with assumption of risk.<sup>437</sup>

Second. When the employee continues at work in reliance upon the master's assurance that a dangerous condition will be remedied, the employee's assumption of the risk arising from the condition promised to be remedied is suspended, *eo instante*, by such promise, and his right of recovery remains intact so long as he may reasonably expect the promise to be fulfilled.<sup>438</sup> The master's promise need not be expressed: it is sufficient if the servant has a right to believe that the defect will be remedied.<sup>439</sup> Nor need the promise be made by the master himself, since he is bound by the act of one having authority in such matters.<sup>440</sup>

It has been said, in at least one case, that a servant does not assume the risk of any defects in the things about which he is employed unless, knowing the defects, he remains in the employment of his master without objection or protest against their continuance.<sup>441</sup> Protest is here apparently treated as evidence of non-consent, and so as inconsistent with the theory of "voluntary assumption of risk". But so merciful a view, if it were really entertained, has not been adopted. It is now settled that complaint of a defect, without a promise of remedy, will not relieve the employee of assumption of the risk if he continues in the service.<sup>442</sup>

Third. A servant may be justified by express command of the master or his representative in doing an act from which danger may reasonably be apprehended.<sup>443</sup> This rule is especially applicable to employments like railroading in which due subordination and prompt obedience to orders are indispensable to the safety of life and property. But to justify a particular act the order must be specific; <sup>444</sup> while even an express command will not excuse an employee in incurring an unnecessary danger which is apparent to him.<sup>445</sup>

Fourth. A principle which is somewhat analogous to that just stated is, that a servant is entitled to place some reliance upon the assurance of his superior who is presumably better informed than himself that an appliance is safe or that an act may be safely done.<sup>446</sup> Either an express command or an assurance of safety tends to negative both contributory negligence and assumption of risk, since the one implies a want of voluntary action and the other shows excusable ignorance of the danger to be incurred.

It has been seen that an act which would otherwise be contributory negligence may be excusable when the employee's attention is necessarily engrossed by the performance of duty so that a known danger is absent from his mind, or where an emergency exists requiring prompt action. It is clear, however, that circumstances such as these can not, in

a logical point of view, be held to negative a contractual assumption of risk. For when a risk has been assumed, the master's negligence with respect thereto is waived, and this waiver can not be affected by the particular situation in which the employee may be placed, or the rapidity and promptness with which he may be required to act at the time of the accident.<sup>447</sup> Such is undoubtedly the general rule as recognized in this and other States.<sup>448</sup>

*Criticism of Assumption of Risk:*—Assumption of risk, in common with other employers' liability doctrines, finds its sanction in the *laissez faire* economics of our great grandfathers.<sup>449</sup> That the real foundations of the doctrine are economic, rather than juristic, may be shown by reducing it to a series of propositions. First. No man owes any duty of protection to another beyond affording him the opportunity to protect himself. Second. Consequently, one who knowingly incurs a danger which he might have avoided can not complain of an injury thereby sustained (expressed in the maxim, *volenti non fit injuria*).<sup>450</sup> Third. The employee is not bound to risk life or limb in the service of his employer. He may insist on wages proportionate to the risk he incurs, may decline an extra-hazardous employment, or protest against unduly dangerous conditions and quit the service of a master who will not exercise proper care for his safety.<sup>451</sup> Fourth. If, therefore, an employee rather than quit his master's employment chooses to work in a situation which exposes him to abnormal hazard, the risk of being injured thereby is his own.<sup>452</sup>

The weakness of this chain of reasoning lies in the postulate, that the wage-earner is free to choose the conditions under which he will work. It may be true, in an academic sense, that the wage-worker is at liberty to seek other employment if he does not like his employer's methods.<sup>453</sup> His limbs are not fettered, he is not restrained by physical force

nor by threat of bodily harm, nor is he legally bound to continue in a particular employment. Nevertheless, in practical life, poverty, ignorance of other opportunities, scarcity of employment, dependence of family, and other economic circumstances often compel the wage-worker to accept employment on any terms that are offered.<sup>454</sup> Men do not choose to work in fire-traps, or to couple moving cars with a link and pin, any more than they prefer to live in slums or to die of "phossy jaw"; but they are constrained by the fear of losing their jobs to face the chance of injury rather than of destitution. Practically speaking, the locomotive engineer just in from a twelve-hour trip can not decline to take out another train: to do so would be to incur dismissal and to court black-listing. The machine tender can not quit his post because he is exposed to an unguarded set-screw: in the absence of penal legislation he would find unguarded set-screws in other factories, even should he be fortunate enough to obtain a place in one of them.

In short, the worker's liberty to protect himself against undue hazard by exercising his right to quit is, as even the courts are beginning to perceive, "a myth"<sup>455</sup> and "a heartless mockery".<sup>456</sup> But this recognition of the involuntary character of the "servant's assumption of risk" leaves the whole doctrine without support in equity or morals.

*Statutory Modification of Assumption of Risk:*—The rule which makes the employee remediless against even the gross negligence of his employer, if only that negligence is habitual and notorious, is so oppressive to workingmen<sup>457</sup> that organized labor has, not unnaturally, long sought to secure its abrogation. The courts having declared their inability to modify the judge-made law in this respect,<sup>458</sup> the unions appealed to the legislature. Their first success was won in 1890, when the defense of assumption of risk was abolished as against violations of the automatic coupler and



brake law enacted in that year.<sup>459</sup> They had to wait half a generation before they gained strength enough to carry a second outwork in the employer's fortress. A bill which would have enabled employees to relieve themselves of the assumption of extraordinary risks by notifying the master of defects in ways, works, or machinery was introduced at the legislative session of 1906;<sup>460</sup> but was defeated by the combined opposition of manufacturers and railways.<sup>461</sup> At the next meeting of the General Assembly, however, the Iowa Federation of Labor and the State Manufacturers' Association agreed upon a compromise measure which became law.<sup>462</sup>

The Assumption of Risk Act of 1907 is as follows:

In all cases where the property, works, machinery or appliances of an employer are defective or out of repair and the employe has knowledge thereof, and has given written notice to the employer, or to any person authorized to receive and accept such notice, or to any person in the service of the employer and entrusted by him with the duty of seeing that the property, works, machinery or appliances are in proper condition, of the particular defect or want of repair or when the employer or such other person has been notified in writing of such defect or want of repair by any person whose duty it is under the rules of the employer or the laws of the state to inspect such works, machinery or appliances, or any person who is subject to the risk incident to such defect or want of repair; no employe after such notice, shall by reason of remaining in the employment with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair.<sup>463</sup>

The labor unionists were by no means satisfied with this legislation. Particularly objectionable to them was the requirement that the employee give written notice of defects if he would avoid assuming the risk thereof. Some workmen, it was urged, are unable to write and many would probably be deterred by fear of discharge from filing notice of dangerous conditions.<sup>464</sup> Accordingly, vigorous efforts



were made to have the act of 1907 amended by the Thirty-third General Assembly, and the result was the Assumption of Risk Act of 1909 which reads as follows:

In all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery or appliances to furnish reasonably safe machinery, appliances or place to work, the employe shall not be deemed to have assumed the risk, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employe may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employe to make the repairs, or remedy the defects. Nor shall the employe under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment. And no contract which restricts liability hereunder shall be legal or binding.<sup>465</sup>

This statute has not yet been construed by the Supreme Court <sup>466</sup> so that its precise effect must be a matter of opinion. (1) The language of the act is that of the common law and it is apparently intended to abrogate the doctrine of assumption of risk due to the master's negligence. Hence it does not apply to working places, such as a miner's room, which by law or custom are in the keeping of the workman; <sup>467</sup> nor to defects which it is the duty of the employee to repair, since the risk of injury in making such repairs is an "ordinary" risk of the employment,<sup>468</sup> while failure to make the repairs would be contributory negligence.<sup>469</sup> As to all other cases, the employer's knowledge of a defect is treated as equivalent, in common law, to a continuing promise to repair. (2) Being remedial, rather than penal in character, the act probably will be broadly construed. If

so, it will not be necessary to show that the employer had actual knowledge of a given defect if, in the exercise of reasonable care, he or his vice-principal would have known of it. (3) The language of the act does not embrace unsafe methods of work, nor failure to formulate rules, or to employ a sufficient number of reasonably competent servants. As to these phases of the master's duty assumption of extraordinary risks apparently remains unaffected.<sup>470</sup> (4) The clause as to "risks incident to the employment" must be regarded as surplusage. Nothing in the statute would justify a construction transferring these risks from the employee to the employer. (5) The clause, "Nor shall the employee under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work", appears to be two-edged. It estops the employer from setting up the contention that the employee has "waived" the negligence under *volenti non fit injuria*, as distinguished from assumption of risk — a contention which, if the courts should adopt a narrowly technical view, might otherwise, in certain cases, defeat the object of the statute.<sup>471</sup> It leaves assumption of risk operative in those cases where in other jurisdictions continuance at work would constitute contributory negligence. How much this exception will amount to will evidently depend on what the courts hold to be a "danger imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work".

The act of 1909 is evidently more favorable to the employee than that of 1907. It does away with the requirement of a written notice of defects — a requirement that would, in many cases, defeat the remedial purpose of the statute. It prohibits contracting out — unless, indeed, the Supreme Court should revert to the view, adopted before the Temple Amendment with respect to the Railway Lia-

bility Act, that an employer may, notwithstanding this prohibition, escape liability by maintaining a system of so-called "voluntary relief".<sup>472</sup> It forecloses the defense of *volenti non fit injuria* as a substitute for assumption of risk. One might wish that the enumeration of negligent acts with respect to which assumption of risk is abrogated were more exhaustive and that provisions analogous to those of the Temple Amendment were incorporated in the contracting-out clause. Still, the statute as it stands strips the once-formidable doctrine of assumption of risks of most of its terrors for the employee.

The Assumption of Risk Act of 1909 is general in its terms and railways are doubtless within its provisions. An assumption of risk clause was, none the less, incorporated by the Thirty-third General Assembly (1909) in the Contributory Negligence Amendment to the Railway Liability Statute. The clause reads as follows:

Nor shall it be any defense to such action [for the personal injury or death of an employee] that the employe who was injured or killed assumed the risks of his employment.<sup>473</sup>

This language might seem to refer to ordinary risks, but the phrase "nor shall it be any defense" clearly indicates risks due to the negligence of the railway corporation since assumption of ordinary risks is not a matter of defense — injuries due to such risks afford no ground of action at common law (see above, p. 22) nor under the Railway Liability Statute (see above, p. 44). As a part of the Railway Liability Statute, the assumption of risk provision is doubtless restricted to injuries arising from hazards peculiar to railway operation (see above, p. 42) and is fully guarded against "contracting out" (see above, p. 45). As to injuries within its scope the railway assumption of risk clause is apparently broader than the general Assumption of Risk Act.

## SUMMARY OF EXISTING EMPLOYERS' LIABILITY

As the law now stands in Iowa a workman who has been injured in the course of an ordinary employment may recover if he can show, by a preponderance of evidence, that his injury was immediately caused by his employer's failure to exercise ordinary care for his safety and was not in any degree proximately contributed to by any want of ordinary care on the part of the injured workman. Conversely, he can not recover if his injury was due to an "ordinary hazard" of his employment, or to the negligence of a fellow-workman, or to a defect, although produced by his employer's negligence, which it was the employee's duty to repair or which was so manifestly and immediately dangerous that a "reasonably prudent person would not have continued in the prosecution of the work". By way of exception a railway worker is permitted to recover for an injury arising out of the operation of trains notwithstanding that the injury may have been immediately caused by the negligence of a co-employee and although it may have been in some measure contributed to by the negligence of the injured workman himself.

## IV

### THE PRACTICAL WORKING OF EMPLOYERS' LIABILITY

The foregoing pages have set forth the system of accident indemnity worked out in the course of half a century by the joint labors of the courts and the General Assembly of Iowa. How does this system work? Does it distribute the pecuniary burden of work accidents in an equitable manner, as judged by current morality? Is it prompt, certain, and economical in operation? Does it conduce to harmonious relations between employers and employees? Does it offer adequate incentive to those who have the power to avoid preventable injuries? If defective in any or all of these respects, can its defects be remedied by the modification of certain details without abandoning the basic principle that there can be no recovery except where the employer was "at fault"? To answer these questions it will be necessary to consider in some detail the practical working of the existing law.

#### WHO BEARS THE LOSS

Detailed statistics gathered by the Imperial Insurance Office show that only one-eighth of the industrial injuries in the German Empire are due to "defective apparatus, or arrangements, etc.", "Absence of or defective safety appliances", "Absence of or defective regulations, supervision", or other "fault" of the employer or his responsible manager, supervisor or foreman,<sup>474</sup> so as to afford any ground of recovery under the Iowa law.

In the absence of first-hand domestic statistics this German experience may be accepted as somewhat indicative of



the proportion of work accidents for which the Iowa law provides indemnity. To be sure, the great attention paid to accident prevention in Germany operates to reduce the percentage of industrial casualties attributable to the fault of employers. But this fact is largely offset by the much lower standard of care set up by the common law, by reason of which many accidents that would in Germany be attributed to the employer's fault are with us assigned to the "ordinary risks" of the employment. In Wisconsin it has been estimated that less than twelve per cent of factory accidents are chargeable to the employer's want of "ordinary care".<sup>475</sup> Experts of the Minnesota Bureau of Labor estimate that less than one-sixth of the work accidents of that State could be prevented by "ordinary care" on the part of employers.<sup>476</sup> Data for such an estimate have not hitherto (1911) been gathered in Iowa, but there can be no reasonable doubt that the existing law grants compensation for only a small minority of industrial injuries — certainly not more than one out of six, probably not more than one out of eight.

What has just been said refers only to the proportion of work injuries for which the employer is legally responsible. In practice, of course, the payment of compensation often depends on other factors than the bare legality of the claim advanced. In the first place, the employer may grant relief from motives of policy or humanity where no legal liability exists, or he may compromise a claim which he believes to be unfounded rather than incur the expense and annoyance of a law-suit. In the second place, juries notoriously are prone to award verdicts for the plaintiffs in employers' liability cases, partly out of sympathy with necessitous claimants combined with enmity toward wealthy defendants, partly because of an ill-defined but wide-spread belief that the existing law is inequitable.<sup>477</sup> On the other hand, the burden of proof resting upon the plaintiff in an employers' liability

case is a heavy handicap. Necessarily the witnesses in his favor are his co-employees; and these, whatever their secret sympathies, commonly are afraid to testify against their employer's interests.<sup>478</sup> Hence the injured workman frequently fails to make out a *prima facie* case and finds himself non-suited for lack of testimony. This fact, and the power which is pretty freely exercised by both trial and appellate courts<sup>479</sup> to set aside verdicts as being unsupported by the evidence, at the very least fully off-set the bias of juries in favor of the plaintiffs. Add the overwhelming strategic advantage, in a contest where Providence is most often on the side of the longest purse, of a great employing corporation over a penniless litigant, and it will appear probable that the number of work accidents for which substantial recovery is had does not much exceed the number for which the employer is legally responsible.

These *a priori* conclusions are borne out by such limited investigations as, in the absence of full records, constitute our only sources of information as to the actual working of employers' liability in common law jurisdictions. Thus, the investigators of the Pittsburgh Survey found that of 258 families who were bereft of husband and father by a single year's work accidents in Allegheny County, Pennsylvania, 59 received nothing whatever from the employer, 65 were paid bare funeral expenses, 40 obtained some assistance but less than \$500 each, and only 48 received more than one year's wages of the lowest paid worker.<sup>480</sup> The dependents of unmarried men fared worse, for 65 per cent of such dependents received nothing above funeral expenses. As to non-fatal injuries, 56 per cent of the married men, 66 per cent of the single men contributing to the support of others, and 69 per cent of the non-contributing men received nothing to make up for lost income. Of 27 men who suffered mutilation entailing permanent partial disability — such as the loss of an eye, a leg, an arm, or two fingers — not one

received more than \$225, that is, not one was in any way indemnified for the permanent impairment of his earning capacity.<sup>481</sup>

Investigations in other States than Pennsylvania yield analogous results. In Cook County, Illinois, the dependents of 70 out of 149 victims of fatal work accidents, were wholly uncompensated, 38 obtained an average of \$700 by settlement out of court, and 40 had claims pending after the lapse of eighteen months or more.<sup>482</sup> In Erie County, New York, \$500 or more was paid for only 22, and \$2000 or more for only 8 out of 115 married men killed. In Manhattan Borough only 4 out of 67 families recovered as much as \$2000 for the death of the head of the house. Recovery of more than \$2000 was had in 2, and of less than \$500 in 35, of 57 fatal cases investigated by the New York Department of Labor. Of 10 men totally disabled for life, 9 failed to get any substantial indemnity and the remaining victim was still seeking damages at the close of the investigation. In 54 of 71 permanent partial disability cases no substantial recovery was had, while more than \$500 was recovered in but six cases. No substantial indemnity was paid in 708 out of 902 temporary disability cases. In other words, substantial, though generally inadequate, indemnity for loss of earning capacity was paid in but 214 of 1222 work accident cases investigated in New York State — or about 17 per cent of the total.<sup>483</sup> The Minnesota Bureau of Labor found that compensation amounting to substantial relief was paid in 11 per cent of the fatal cases, 30 per cent of the permanent disability cases, and 50 per cent of the temporary disability cases investigated.<sup>484</sup> In Wisconsin, of 306 workmen seriously but not fatally injured, 72 received nothing from their employers, 99 received doctor bills only, 44 were paid less than the cost of medical attendance, and only 91 recovered even a part of the wage loss.<sup>485</sup>

Even more significant than any of these very limited col-

lations of cases is the experience of companies writing employers' liability insurance. Nine of the largest of such companies in three years' time (1906-1908) settled 414,681 claims, paying compensation in but 52,427 cases or 12.64 per cent of the total — about one in eight.<sup>486</sup>

The case for the existing law of employer's liability as a system of indemnifying work accidents is nowise strengthened by a comparison between the losses sustained and the damages recovered on account of such accidents. In the Pittsburgh District, 139 families concerning whom all the facts were ascertained suffered an income loss of \$109,262 *yearly* and recovered a *total* of \$74,305, from which is to be deducted their lawyers' fees (at least \$25,000) and medical and funeral expenses of not less than \$100 each, leaving an average net indemnity of \$254 for the death of a breadwinner.<sup>487</sup> The average compensation for a workman's eye in the same community, to judge from reported cases, is \$56.64; for a leg, \$117.50; for an arm, \$33.33; for a finger, \$7.14.<sup>488</sup> Reckoning a life at only three years' wages, certainly less than the actuarial value, and counting in expenses of burial and medical attendance, it appears that in the State of New York, in investigated cases, the injured workmen and their dependents bear 83 per cent of the financial cost of fatal injuries, 90 per cent of the cost of permanent disability, and 71 per cent of the losses from temporary incapacity.<sup>489</sup> In Minnesota, according to data collected by the State Bureau of Labor, after deducting legal, medical, and funeral expenses, a workman's family receive, on an average, \$536 for his death.<sup>490</sup> On the same basis, the industries of that State pay \$123.22 for an eye, \$557.50 for a hand, \$1931.50 for an arm, \$88.22 for one or more fingers, \$156.40 for a leg, and \$256.66 for a foot.<sup>491</sup> In Michigan, the average compensation in 35 fatal cases was \$388.53 and in 7116 non-fatal cases was but \$10.91. The wage loss incurred by 614 employees on account of temporary disability was



\$58,189.77; the total compensation (inclusive of attorney's fees) amounted to \$24,189.78.<sup>492</sup>

The investigations from which the above illustrations are taken were so limited in time and scope that no great significance can be attached to the particular averages quoted. It is to be remembered, moreover, that recent legislation has made the law in Iowa more favorable to the workman than it was in any of the above-mentioned jurisdictions at the time to which the foregoing data refer. Still, when all allowances are made, the *general* results of these impartial investigations in six widely separated States fairly represent the working of an employers' liability law like that of Iowa. The conclusion to which these investigations lead is inescapable — the pecuniary cost of work accidents in Iowa falls almost wholly upon the victims thereof. The workman who is killed or injured in the course of his employment may be provided with medical attendance or a decent burial by the policy or humanity of his employer,<sup>493</sup> but ordinarily he has no legal claim thereto. The stricken family may be aided by neighbors scarcely less necessitous than themselves,<sup>494</sup> or, by declaring themselves paupers, they may receive humiliating assistance from the poor-law authorities or the associated charities. But in at least five cases out of six there is no indemnity for the income loss occasioned by the accident.

Courts have often remarked, in justification of this distribution of the cost of work accidents, that the ordinary and expectable risks of the service are taken into consideration in fixing the terms of employment, so that the wages paid include compensation for the hazards incurred as well as for the labor performed.<sup>495</sup> Such a theory may have had some support in English classical economics,<sup>496</sup> but it is founded on assumptions which have long since been exploded<sup>497</sup> and which notoriously are contrary to fact. If employers and workmen stood on an equal footing in the



negotiation of wage agreements; if the loss of his place were a matter of trivial consequence to a wage-earner; if laborers possessed exhaustive knowledge of relative professional risks, and of opportunities for employment throughout the industrial world; if local attachments or the want of means presented no obstacle to removal from Chicago to Honolulu; if a locomotive engineer could, without loss of time or efficiency, transfer his specialized knowledge and ability to type-setting or rail-rolling — wages might conceivably be adjusted to risks. But the unreality of these hypotheses is now conceded even by orthodox economists of the straitest sect.<sup>498</sup> In point of fact, as things actually are, occupational hazards appear to have very little effect on wages.<sup>499</sup> Competition does not suffice to shift the cost of work accidents upon employers. Under existing law the pecuniary burden of such accidents rests finally where it falls in the first instance — upon the injured workmen and their dependents.

When the economic situation of wage-earners is called to mind, and when it is remembered that a large majority of those killed or injured while at work are responsible for the maintenance of others as well as of themselves,<sup>500</sup> the reader will be prepared to learn that the “by-products”<sup>501</sup> of employers' liability are want, dependence, child labor, and the breaking up of homes. But the actual findings of investigators in various common law jurisdictions are such as to startle even those whose personal observation has familiarized them with the working of employers' liability. Of 147 families, numbering 558 members, who, in Cook County, Illinois, applied for out-door relief in consequence of industrial injuries, 104 had no wage income whatever, and 43 were earning on the average \$6.88 per week, largely the wages of children under sixteen years of age.<sup>502</sup> Of 86 accident-made widows in Cuyahoga County, Ohio, 48 found employment at an average weekly wage of \$5.51; of 45 chil-

dren between the ages of twelve and eighteen years, 27 were put to work.<sup>503</sup> Out of 132 families in the Pittsburgh District, 55 widows and 22 children went to work, 13 families went to live with the parents of the widow or of her husband, and 35 other families were kept together only by the aid of relatives.<sup>504</sup> In Wayne County, Michigan, 26 families, numbering 118 members, who became dependent as the result of fatal work accidents, enjoyed aggregate earnings of \$78.70 per week.<sup>505</sup>

These experiences are typical. When a skilled craftsman is killed or injured in the course of duty, the children are taken out of school, the family removes to less comfortable quarters in a more undesirable neighborhood, the mother takes boarders or goes out to work, the boys sink to the rank of the unskilled, and the girls marry beneath the economic class in which they were born. When a similar calamity befalls a common laborer the widow and the older children eke out such scanty earnings as they can at casual work or in the sweated trades; if the family are numerous or the children young, the pitiful struggle often ends in dependence or crime.<sup>506</sup>

#### DELAY AND UNCERTAINTY OF THE LAW

The existing system of employers' liability not only denies indemnity for all but a small minority of work accidents, but it grants relief, when at all, only after delays that often make the final recovery little better than none. It is immediately following an industrial injury, when medical and funeral expenses are to be met and when the ordinary wage income has been cut off, that aid is most needed by the stricken family. After a few months, when the sufferer has died or returned to work, when the mother and the older children have found employment, and when the family budget has been re-adjusted to a diminished income, the need is much diminished. Yet settlement through the courts

frequently is delayed until the economic consequences of the death or disability have worked out their worst results and the evil is beyond repair.

In Ohio it requires two years, on the average, to reach final judgment in a fatal accident case.<sup>507</sup> In Cook County, Illinois, of 42 suits begun in 1908 only two had been decided by October, 1910. In 30 non-fatal cases in the same county the average length of time required to reach a settlement by "due process of law" was more than two and one-half years, while 15 out of 45 cases were still pending in court after periods ranging from four to eighty-four months and averaging nearly four years.<sup>508</sup> In New York State the "waiting period" in employers' liability cases lasts from six months to six years, with a marked tendency toward the higher figure in populous centers where work accidents are most numerous and court calendars most crowded.<sup>509</sup>

In individual cases the delay is indefinitely greater. In Cook County, Illinois, a switchman who lost a leg in October, 1905, recovered \$200 in December, 1908. A steel worker, blinded in November, 1907, settled his claim out of court in May, 1910. A switchman who had both legs amputated in November, 1903, had his suit pending in November, 1910. Of forty-seven court cases examined in that State, eleven were still pending after intervals ranging from three to seven years.<sup>510</sup>

In an Iowa case it required six years' time, four juries, and four appeals to the Supreme Court to determine a carpenter's right to indemnity.<sup>511</sup> The claim of a railway brakeman for injuries sustained in Appanoose County, Iowa, though diligently prosecuted through successive courts, only reached final decision twelve years after the accident occurred.<sup>512</sup>

With all this deliberateness the courts might fairly be expected to apply their own doctrines with some approach to exactness and equality, according like treatment to like

cases. In point of fact, however, employers' liability adjudication can only be likened to a lottery. The utterly haphazard operation of this branch of the law has been noted by all investigators of the subject<sup>513</sup> and may be demonstrated from the court records of any industrial community. The dependents of nineteen men killed by "defective machinery, ways or works", in Cook County, Illinois, received \$30,105 in the way of indemnity; but the families of nine of these men got \$22,388 and the families of the remaining ten \$7,767.<sup>514</sup> The total compensation for forty-seven fatal railway accidents in Erie County, New York, was \$45,824.52, whereof \$19,351 went to two families.<sup>515</sup> Of six men totally disabled for life in Minnesota one received \$150, one \$175, one \$4,500, and three got nothing.<sup>516</sup> Two railway switchmen, each of whom had lost both legs in the service, recovered respectively \$17,619, and \$2,138.<sup>517</sup> Of 38 persons partially incapacitated for life in Wayne County, Michigan, 19 received nothing and 7 were paid more than three-fourths of the total amount recovered.<sup>518</sup>

An indemnity system which tediously grinds out such results as these is no better than a gamble — "a gamble which awards a few prizes to injured persons and deludes all other injured persons into thinking they are going to draw prizes, too, when, as a matter of fact, they are going to draw blanks; a gamble which makes the employer pay preposterous sums to certain people and so prevents him from paying reasonable sums to all. It is on the same level as *faro*." <sup>519</sup>

What the existing law of Iowa at its best secures to the injured workman is "a right to retain a lawyer, spend two months on the pleadings, watch his case from six months to two years on a calendar and then undergo the lottery of a jury trial with a technical system of law and rules of evidence, and beyond that, appeals and perhaps reversals on



questions that do not go to the merits. . . . If he wins, he wins months after his most urgent need is over.''<sup>520</sup>

Such delay and uncertainty are not merely a hardship to the particular litigants involved; they strongly tend to reduce the average recovery in employers' liability cases. The sufferers from work accidents are nearly always necessitous and often are destitute. They must have immediate relief. They know that immediate relief through the courts is out of the question, and ultimate relief highly uncertain. They have every inducement, therefore, to accept whatever settlement is offered by the claim agent of the employer or of the liability insurance company, and they frequently sign releases for absurdly inadequate amounts.

#### WASTEFULNESS OF THE SYSTEM

The benefits accruing to workmen from the existing liability law are small enough, but the burden imposed by it upon employers is by no means light. This result is due rather to the wastefulness of the indemnity system than to the indemnities actually paid.

Litigious justice is necessarily wasteful, for success in litigation often depends more upon the skill or unscrupulousness of the attorneys employed than upon the legal merits of the claims advanced or opposed.<sup>521</sup> But the cost of employers' liability suits is increased by the very poverty of the claimants for whose redress the law ostensibly exists. Having no resources of their own, these plaintiffs can only secure counsel upon contingent fees. Since the court costs in unsuccessful suits — about one-half of the whole number of such actions brought<sup>522</sup> — must be paid by the attorneys themselves, the fees in successful cases must be large enough to recoup these losses and remunerate counsel for time and labor spent in winning and losing cases alike. Accordingly, of the damages awarded by courts, from one-fourth to one-half are pocketed by counsel for plaintiffs.<sup>523</sup>



The contingent-fee system and the uncertainty of the law further multiply waste by multiplying litigation. The spectacular damages occasionally awarded by juries and affirmed by courts of last resort act like the few high prizes of a lottery, tempting claimants to bring suits on the chance of recovering what, in their eyes, amounts to a fortune. This they are all the readier to do since, having no pecuniary responsibility, a losing suit costs them nothing. Personal liability lawyers take shrewd advantage of the gambling instinct thus invoked, encouraging claimants to sue no matter what the legal merits of their claims. Employers frequently compromise such suits rather than incur the heavy expense of even a successful defense — and the enterprising attorney pockets a liberal share of the amount paid in settlement. In this way has grown up a regular profession of “ambulance chasers”, who, personally or by “runners”, pursue the wounded or the family of the slain, soliciting permission to bring suit, and who sometimes anticipate the visit of the claim agent himself.<sup>524</sup>

The enormous waste entailed by such a system of administering “justice” is well shown by the experience of employers in the State of New York. In 1907 it appears that 327 firms in that State paid out on account of work accidents \$255,153.17, which was distributed as follows: —

TABLE I <sup>525</sup>

Employers' attorneys, court costs and claim departments . . . . .	\$ 14,557.24
Profits and expenses of employers' liability insurance companies . . . . .	73,338.00
Plaintiffs' attorneys and court costs . . . . .	23,753.92
To claimants, in settlements and damages . . . . .	80,888.88
To employees' benefit associations . . . . .	13,365.01
Medical, hospital, and funeral expenses . . . . .	49,250.12
Aggregate waste . . . . .	111,649.16 or 44%
Total received by injured workmen and their dependents . . . . .	143,504.01 or 56%

That is to say, of every \$100 paid out by these employing firms on account of work accidents but \$56 reached the injured workmen and their dependents. But this showing is unduly favorable to the law, for at least \$50,000, or one-fifth of the total amount considered, was voluntarily paid by employers in contributions to relief associations in medical expenses, and the like, outside the law. A fairer test of employers' liability is afforded by the \$192,538 paid by these same employers as the result of law suits or to avoid law suits, whereof only \$80,888, or forty-two per cent, reached the beneficiaries.<sup>526</sup>

The percentage of waste is noticeably higher where the employer resorts to liability insurance. Ten companies writing such insurance made the following record in three years' time:—

TABLE II <sup>527</sup>

Collected from employers . . . . .	\$23,523,585
Absorbed by companies, in profits and expenses . . . . .	14,963,790
Received by plaintiffs' attorneys, (about) . . . . .	1,900,000
Received by injured workmen or their dependents, (about) . . . . .	6,660,000

In other words, of every \$100 paid out by employers for protection against liability to their injured workmen, \$28 is paid to those workmen; \$8 goes to the attorneys who aid them in recovering this amount; and \$63 goes to attorneys and claim agents whose business it is to defeat the claims of the injured, to the costs of soliciting liability insurance, to the expenses of administration, and to the profits of the insuring companies.

Iowa employers, during the ten years from 1902 to 1912, paid for liability insurance \$1,592,770, whereof \$814,037, or fifty-one per cent, was expended in settlement of claims.<sup>528</sup> There are no records to show how much of the last-mentioned sum reached the ultimate beneficiaries, but if New York experience is any guide the actual indemnities could not have much exceeded \$600,000. Employers' annual

premiums in this State are now close to \$300,000, and the annual waste must be near two-thirds of this amount.

And yet, for all its wastefulness liability insurance is a necessity for all but the largest employers. The accident rate and the cost of settling accident claims are fairly constant and so calculable for a whole industry or for a great employing corporation, but they are so variable as to be wholly unpredictable for a single establishment of moderate size. Hence the small employer can better afford to pay even excessive premiums for liability insurance than run the risk of being ruined by an exceptional number of accidents or by a few very large verdicts against him. Moreover, despite the heavy overhead charges the liability companies, with their thoroughly organized claim departments and their highly specialized legal talent, can settle a given aggregate of claims at less cost to the defendants, if also with less benefit to the claimants, than could the employers themselves acting individually. Accordingly this type of insurance has grown with the growth of capitalistic industry. From \$56,471 in 1902 employers' liability premiums in Iowa rose to \$280,577 in 1911.<sup>529</sup> Such a rate of increase strongly indicates that liability insurance fills an economic need under present conditions.

The waste of the present accident indemnity system is not adequately described by saying that it takes from employers at least three dollars for every dollar that it gives to injured employees and their families. Employers' liability litigation imposes a heavy charge upon the State as well as upon employers. Competent authorities estimate that such litigation employs one-fifth of the time of the very expensive judicial machinery of New York State.<sup>530</sup> Adding this to the other items of waste it appears probable that not more than one-fourth of the whole cost of employers' liability is devoted to its social purpose of relieving the victims of work accidents.

## EFFECT ON THE RELATIONS OF EMPLOYERS AND EMPLOYEES

The system of settling claims for accident indemnity described in the foregoing sections is not merely wasteful: it breeds disharmony and ill-will between employers and employees.

The small employer would very often be prompted by humanity and personal interest to give generous relief to a faithful workman injured in his service. But this his liability policy forbids. He can not grant anything beyond first aid without securing a waiver of further claims — that is, without driving a hard bargain. He commonly is required, indeed, to leave all negotiations to the cold-blooded claim agents of the liability insurance company, who earn their salaries by securing settlements at the smallest possible cost. For the employer to provide a physician, or even to visit the injured man, might be taken as an acknowledgment of liability which would embarrass the claim agent in reaching an adjustment. Such a policy is admittedly harsh, but practically it is forced upon employers and liability companies alike by the menace of costly damage suits.

Large corporate employers usually maintain their own claim departments, which commonly are managed on the same purely "business" basis as the like departments of liability companies, and with similar results. It is only where the employer, disregarding his legal rights, indemnifies injuries through genuine "relief departments" or otherwise, that reasonable satisfaction is attained, not under, but in spite of, the law.<sup>531</sup> And even "relief departments" not infrequently are used as a sort of liability insurance, carried mainly at the expense of employees.<sup>532</sup>

The injured workman almost invariably feels that he has a just claim to compensation. He has shed his blood in his employer's service and he resents the harshness and, as he considers it, the injustice of the latter's efforts to deprive

him of what he believes to be his deserts. He is the more ready, accordingly, to embrace the alluring hopes held out by the contingent-fee lawyer. But to file suit is to provoke the resentment of the employer who usually is convinced that the accident was not his fault and that he ought not in justice to be held in damages. To prosecute the claim is to engender more than the ordinary bitterness of law-suits, for the one party is convinced in advance of the unfairness both of the law and the judge and the other of the prejudice of the jury.

The ill-feeling thus engendered affects not alone the particular workers injured but their fellows, both through sympathy with their stricken comrades and through anticipation of the evil day when they themselves may stand in the like case. The resultant antagonism between employer and employee is, to employers at least, one of the most deplorable results of the present unhappy system.<sup>533</sup>

#### EFFECT ON ACCIDENT PREVENTION

The bill of complaints against the existing system of employers' liability already is a long one; but the most serious count in the indictment is yet to be made, namely, it does little or nothing to reduce the number of work accidents. An indemnity system may promote safety either by stimulating caution on the part of workmen or by making accident prevention greatly to the interest of employers. The existing liability system is ineffective in both of these respects.

Chief Justice Shaw and those jurists who were inspired by him have often enough asserted that "the moral effect of devolving these [work] risks upon the employees themselves would be to induce a greater degree of caution, prudence and fidelity than would in all probability be otherwise exercised";<sup>534</sup> and, conversely, that to make the employer unconditionally liable for work accidents "would be an encouragement to the servant to omit that diligence and cau-



tion which . . . are a much better security against any injury the servant may sustain . . . than any recourse against his master for damages could possibly afford." <sup>535</sup> But this is arguing that men deliberately incur death or mutilation in order that they or their heirs may sue for damages — an argument which refutes itself. <sup>536</sup>

Irrespective of indemnity, workmen have the strongest possible incentive to care in the instinct of self-preservation. Such recklessness as they undeniably are guilty of springs from temperament, habit, haste, and over-strain, not from calculation; and the corrective is to be found in rigid discipline enforced by the employer rather than in appeals to self-interest.

Employers, on the other hand, are, as regards accident prevention, more amenable to pecuniary motives. Not that employers are more mercenary than workmen or that the former are more often guilty of intent to murder than the latter of attempted suicide; but the preventive measures open to employers call for no change of habit or disposition; they require only that a portion of that acumen and forethought which is now devoted to increased output and larger sales shall be directed to safer methods of work. The discovery and installation of safety devices, the inspection of plant, materials and equipment, the framing of working rules, and the enforcement of discipline with regard to safety as well as speed, necessitate research and experimentation and entail heavy expenditures. Such measures may, in exceptional instances, be undertaken from humanitarian motives, but they are far more certain of adoption if accident prevention is made to save employers more in dollars and cents than it costs.

This is precisely what the existing liability system fails to accomplish. The law only requires ordinary care, and ordinary care may be exercised by following the usual practice of the trade. Hence so long as a safety appliance, how-

ever efficacious, is not in common use no one is legally "at fault" for not employing it. To install the safer equipment would mean a large, certain, and immediate outlay; whereas the injuries that might be prevented by it promise, at most, a future and wholly problematical expense. Experience has accordingly shown that such safety devices as automatic couplers, air brakes, guards on machinery, belt shifters, fire escapes, safety cages, emergency exits from mines, and countless others have been adopted tardily and only in consequence of penal legislation — not from the pressure of accident liability.<sup>537</sup>

The unregenerate fellow-servant and assumption of risk doctrine (so far as these still are in force) even put a premium upon disregard of safety, in that reckless exposure of the lives of employees if habitually practiced and constructively assented to saves expense while entailing no increased liability. "Great corporations finding that diligence and humanity only increased their liabilities, naturally selected officers who were careful not to know too much about the faults of servants or of implements. The loss of life and the amount of human suffering which have ensued from the want of adequate pressure upon the great carrying companies to protect their servants from injury in their service have been appalling." <sup>538</sup>

The failure of the common law to further the saving of life and limb is not merely a conclusion from *a priori* arguments nor an inference of competent observers. Its impotence in this respect has been demonstrated by unimpeachable statistics. During the ten-year period, 1897-1906, the fatal accident rate, per 10,000 employees, was 31 in the coal mines of the United States as against 13 in those of Great Britain, and 25 on American as compared with 10 on German railways.<sup>539</sup> American industries, under the common law regime, kill and cripple two or three times as many workmen, relatively to the number employed, as do the like

industries of Europe where accident prevention is a business proposition.

#### FINAL ESTIMATE OF THE EXISTING LAW

To recapitulate the conclusions reached in the foregoing paragraphs, the existing law of employers' liability in Iowa (1) imposes the pecuniary burden of work accidents mainly upon the injured workmen and their families, (2) is excessively slow, uncertain, and wasteful in operation, (3) fosters antagonism rather than good will between employers and their workmen, and (4) offers no adequate incentive to accident prevention.

Enough has already been said of the patent inefficiency of the present system. The existing law is no less defective when tested by current standards of social justice. Since work injuries are inevitable concomitants of that mechanical industry which has made modern civilization possible and the products of which are enjoyed in fullest measure by the classes least exposed to its hazards, since the victims of these injuries are precisely those least able out of their own meagre incomes to provide against death or disability, and since the evils of poverty affect not alone the families immediately concerned but the State as well, enlightened public opinion is coming to demand that those who are crippled in the production of the community's wealth and the dependents of those who are slain shall be indemnified by the public for whom they wrought.<sup>540</sup>

Injustice and ineptitude are, then, the outstanding characteristics of the present law. These defects, moreover, inhere in the basic principle of the law itself. No system which makes compensation to depend upon proof that the employer was "at fault" can provide indemnity for more than a minor fraction of work injuries or can avoid the uncertainty, delay, waste, and bitterness incident to litigation. The most sweeping modification of the common law will not

reach the root of the evil so long as the fundamental principle of no liability without fault is retained. It follows that the present situation can only be remedied by legislation on radically different lines from any hitherto enacted in this State.

The foregoing conclusions are not merely those of the present writer: they represent the concensus of opinion among all who have given careful thought to the subject. The Employers' Liability Commission of the State of New York, after the most thorough and extensive investigation yet made into the working of employers' liability in the United States, concluded that "the present legal system of employers' liability in force in this State [New York] (and practically everywhere else in the United States) . . . is fundamentally wrong and unwise and needs radical change."<sup>541</sup> A similar commission in Illinois found the present system "unjust, haphazard, inadequate and wasteful, the cause of enormous suffering, of much disrespect for law and a badly distributed burden upon society."<sup>542</sup> The National Association of Manufacturers, who, if anyone, should favor the existing law, have recorded their conviction that it is "unsatisfactory, wasteful, slow in operation and antagonistic to harmonious relations between employers and wage-workers."<sup>543</sup> The semi-official organ of social workers has editorially declared that the common law, in this respect, is opposed to "economics, philosophy and morals."<sup>544</sup> Former President Roosevelt has pronounced it "neither just, expedient nor humane."<sup>545</sup> Law writers and teachers of law in leading universities are all but unanimous in condemnation of the rules which it is their business to expound.<sup>546</sup> Most significant of all, the law of negligence as a basis of indemnifying work accidents has been "discarded as barbarous and out of date"<sup>547</sup> by nearly all nations except our own.<sup>548</sup>

In lieu of the discredited law of negligence most foreign

countries have provided indemnity systems which are speedy, certain, and economical in operation and which measurably realize current ideals of social justice. Even a brief survey of some of these foreign systems may be expected to throw some light upon what is desirable and possible in Iowa.



## V

### WORK ACCIDENT INDEMNITY ABROAD

Indemnity for work accidents, almost everywhere outside the United States, is based on the theory of occupational risks. It will be convenient, therefore, to preface the actual analysis of foreign indemnity systems with a short statement of this underlying principle.<sup>549</sup>

The theory of occupational risks may be summarized as follows: (1) The consumers of economic goods should bear all the money costs incurred in the production thereof. (2) Among those costs are to be reckoned the pecuniary losses from deaths and injuries occurring in the regular course of production — the expenses of burial and medical attendance for the dead and the injured and the wages lost to workmen and their dependents through the death or disability of bread-winners. (3) Wage-earners, if forced to bear these losses in the first instance, are unable to recoup themselves in the form of compensatory wages or otherwise. (4) The pecuniary cost of work accidents ought, therefore, to be treated like other costs of production under the entrepreneur system — that is, borne by the employers in the first instance and by them shifted in the form of enhanced price upon the consumers of those goods in the production of which the injuries were sustained.<sup>550</sup>

Two general methods of giving effect to the theory of occupational risks are in use, and are commonly known as the "Compensation Plan" and the "Insurance Plan". Many variants of both systems exist, but a summary statement will make clear the main features of each.

By the simple compensation plan each employer is held

individually responsible for injuries sustained in his employment, though he is permitted and even encouraged to insure his risks. This is the system of Belgium, Denmark, France, Great Britain, Greece, Russia, Spain, Sweden, and most of the self-governing British colonies. Insurance in an authorized company usually relieves the employer of personal liability. Not content with this encouragement of insurance, Belgium and France maintain guarantee funds to secure compensations due from uninsured employers; and Belgium requires the capitalized value of uninsured death or permanent disability benefits to be deposited with the State. Finland, Italy, and the Netherlands require insurance of liability, but permit a choice of insurers. To lessen the burden upon employers, the Netherlands and Sweden conduct state insurance departments and Italy has created a national coöperative insurance institute — all of which operate side by side with private liability companies.

The insurance plan differs from the foregoing in making the employers of each industrial group collectively responsible for the compensation of injuries occurring in that group. This is the method adopted by Austria, Germany, Hungary, Luxemburg, Norway, and Switzerland. In Austria and the German Empire indemnities are provided by employers' mutual associations organized industry-wise. In Hungary, Luxemburg, and Switzerland, owing to the smallness of most industrial groups, single national associations are provided. In most of these countries the mutuals are self-governing bodies under state supervision, but the Administrative Council (Verwaltungsrath) of the Swiss Accident Insurance Institution (Unfallversicherungsanstalt) is named by the Federal Council upon the nomination of the trade organizations (Berufsverbände).<sup>551</sup> Part of the administrative expenses is in every case borne by the state. Moreover, the Swiss government donated \$1,000,000 toward the reserve fund of the Institute. In Norway, last-

ly, indemnity insurance is conducted directly and solely by the state.

The compensation and insurance plans having been developed most typically in Great Britain and the German Empire, an outline of accident indemnity in these two countries will sufficiently serve every present purpose.

#### WORKMEN'S COMPENSATION IN GREAT BRITAIN

The British Workmen's Compensation Act of 1906 applies to all employments and to all employees, except non-manual workers whose wages exceed 250 pounds per annum and persons casually employed otherwise than in the course of trade or business; and it covers all injuries by accident "arising out of and in the course of the employment" which cause death or disable the workman for at least one week from earning full wages at the work at which he was employed. The sole defense to a claim for compensation under the act is that the injury was caused by the "serious and wilful misconduct" of the injured person, and even this defense is available only in cases of temporary disability. Nor is "contracting out" of liability under the act permitted, unless the Registrar of Friendly Societies certifies that the employer has provided a scheme of compensation not less favorable to the workmen than the act itself and acceptable to a majority of the workmen affected.

The schedule of compensation is as follows: (1) in cases of death, where there are no dependents, reasonable medical and funeral expenses, not to exceed 10 pounds; (2) in cases of death, where there are persons wholly dependent on the deceased, three years' wages, but not less than 150 pounds nor more than 300 pounds; (3) in cases of death where there are none but partial dependents, payments proportional to such partial dependency; (4) in cases of total disability, one-half of weekly wages (full wages if less than 10 shillings per week) during disability; and (5) in cases of partial disabili-

ity, one-half of the loss of earning capacity. No compensation is paid for disability lasting less than one week, nor for the first week where incapacity does not last more than two weeks. In other cases compensation dates from the time of the accident. To guard against simulation claimants are required to submit themselves for examination to a physician selected and paid by the employer or to a medical referee appointed by the county court.

Disputes under the act may be adjudicated (1) by an arbitration committee representing the employer and his employees, (2) by an arbitrator agreed on by the parties, (3) by a county judge, or (4) by an arbitrator appointed by him. Findings of fact, whether by an arbitrator or by a county judge, are final. On questions of law, appeals lie to the Court of Appeals and ultimately to the House of Lords. In practice, nearly all claims are settled by agreement, only one-fifth of the death claims and one-half of one per cent of the disability claims being taken into court. The number of appeals to higher courts is likewise extremely small. Thus in 1908 it appears that 328,957 injuries were compensated; 5358 disputes were referred to county courts; 112 cases were carried to the Court of Appeals; and 3 cases were taken to the House of Lords. Yet the county courts, although they adjudicate relatively few claims, perform important administrative functions in connection with the law. Death benefits are paid into and administered by these courts and all agreements for the commutation of weekly payments into lump sums must be approved and registered by the same tribunals.

A peculiar feature of the British system is the survival of the earlier employers' liability act alongside of the compensation law, so that an injured workman may make his claim under the latter and also bring suit under the former, though double recovery is not permitted. The number of

actions brought under the employers' liability act is, however, very small and is steadily diminishing.

#### WORK ACCIDENT INSURANCE IN THE GERMAN EMPIRE <sup>552</sup>

The German plan differs from the British in substituting compulsory mutual insurance for individual liability of employers and in requiring contributions from the workmen. Like the British Act of 1906, the German plan covers all employments, includes all manual workmen and other low-paid employees (those who receive in wages or salary less than 5000 marks per annum), applies to substantially all industrial accidents of any consequence, and bases compensation upon the wages of the injured person.

The benefits provided are: (1) medical and surgical attendance, medicines and therapeutic appliances and hospital care where needed, (2) a monthly pension to injured workmen continuing during disability and equal in cases of total disability to two-thirds of the average wages earned during the year preceding the accident, and in cases of partial disability to two-thirds of the loss of earning capacity imputable to the accident (full wages are allowed during disability if the constant attendance of another person is required); (3) a burial allowance in all cases of death resulting from work accidents; and (4) a pension to the surviving dependents of a workman who dies as the result of a work accident, not exceeding one-fifth of the average earnings of the deceased to any one dependent, or three-fifths thereof to all dependents.

The foregoing pensions are regarded, by the government at least, as full indemnity for the pecuniary losses incurred by workmen on account of industrial injuries. The disabled workman at two-thirds pay is thought to be as well off, financially, as he was when at work, regard being had to the ordinary lay-offs and to the extra cost of tools, working clothes, street-car fare, and the like, which the invalid is



spared. Similarly, forty per cent of full wages is considered no more than a fair deduction from the family income for the personal expenses of the deceased.

To provide these benefits employers are organized industry-wise in mutual accident insurance associations which levy annual (or semi-annual or quarterly) assessments upon their members. These assessments are a per centage of pay roll ascertained by comparing, for the whole industry and for each distinct branch, the actual expenditure on account of accidents with the aggregate pay roll for a period of years and taking the average ratio as the basis for the levy of the current year. The contribution of each employer depends, of course, upon his average (computed) pay roll together with his rating in the risk tariff as thus constructed. Where an employer has men engaged in different branches of the same industry his rating is combined from the several partial ratings. And where he is engaged in more than one industry he may belong to more than one association. A rating higher than the normal may be imposed upon any given establishment for failure to comply with the accident prevention regulations prescribed by the association.

Since under the German plan indemnities are paid, not in lump sums but in the form of pensions terminable only by the death of the recipient or by the cessation of incapacity or dependence, the real *cost* of indemnity in any given year is the capitalized value of all pensions due to accidents occurring in that year. On the other hand, the *expenditure* of a given year includes all annuities accrued from past years that are still in force. If, then, assessments were based on the present worth of current liabilities the rates would be high from the very outset but would not increase except for changes in the scheme of compensation or in accident frequency. The employers, however, have preferred to base assessments on current expenditure so that the rates

are low at first but increase gradually with the accumulation of pensions accrued in past years.

The results of this mode of assessment are: (1) that the maximum cost will be higher than the average cost under an adequate actuarial reserve plan; (2) that a part of the costs of current business enterprise is thrown upon employers of the future; (3) that new firms are burdened with the cost of the past accidents of old establishments; (4) that surviving firms must meet the deferred payments of concerns that have failed or withdrawn from business.

These criticisms, however, are fully met, in the view of German employers, by the following considerations:— (1) To accumulate adequate reserves, securely invested, would tie up a vast capital, or at least withdraw it from those industries which are most rapidly expanding. (2) A gradually increasing cost can be more readily incorporated in the price of the product than a great and sudden increase, such as would have been necessary had the full reserve plan been adopted at the inauguration of the insurance scheme. Hence employers of the future will, in reality, be no more burdened than those of the present since they will be equally able to shift this item of cost upon the consumer. (3) At any given time, the accident insurance cost of a particular industry is a definite known charge which new firms must reckon with, as with all other known costs, in deciding whether to enter the business. (4) A reserve is unnecessary to insure the solvency of the associations, since the accident liabilities of an industry are a lien against the assets of all the employers engaged therein. Membership in the appropriate association being compulsory the funds needed to meet current liabilities can be raised at any time.<sup>553</sup>

But, while yielding in large measure to the views of employers, the German government has insisted upon some reserves both to assure ultimate solvency and partially to offset the effects of the current expenditure assessment plan.

The reserve funds of the industrial associations amounted to \$61,000,000 in 1908 as compared with receipts of \$47,000,000 during that year. About \$4,000,000 are annually added to the reserves, and it is expected that by 1921 the interest on these funds will, in the older associations, counterbalance the increase of accrued pensions and secure reasonable stability of rates.

The immediate administration of the accident indemnity system is in the hands of employers' mutual insurance associations, of which there are 66 for industrial and 48 for agricultural establishments, so constituted that each association is thoroughly homogenous as to the character of the establishments included in it. Most of the associations cover the whole empire: only those for iron and steel, other metals, textiles, wood-working, and the building trades are divided territorially. The associations are bodies corporate, have all the rights of persons, are governed by constitutions adopted by a general meeting of the members, and are managed by elected boards of directors and periodical general meetings.

The most noteworthy feature of this plan is that under it employers manage their own insurance. Not only is membership in the appropriate association compulsory upon all employers, but no other form of liability insurance is permitted by law. Private insurance companies are entirely excluded from this field.

Of course, the associations are not free to administer the accident relief system as they choose, but are, in characteristic German fashion, closely checked and controlled by government officials. The chief supervising agency is the Imperial Insurance Office, which is both the administrative head of workmen's insurance and the court of last resort in controversies respecting the accident and the invalidity insurance. This institution is organized in the form of a Senate with a president and other permanent members appointed

for life by the Emperor upon the nomination of the Bundesrath, six temporary members chosen by the Bundesrath, six five-year members representing the accident insurance associations, and six five-year members elected by insured workmen from the associate judges of the insurance arbitration courts.

The Imperial Insurance Office is charged with the explanation of the insurance law, the approval of constitutions of accident associations, of risk tariffs, and of rules for accident prevention, the supervision of the associations, the auditing of accounts, the settlement of controversies relating to risk ratings, assessments, premiums, penalties, and the like, and the determination of appeals from the arbitration courts.

In addition to the Imperial Insurance Office there are State insurance offices in Bavaria, Saxony, Württemberg, Baden, Hesse, Mecklenberg-Schwerin, Mecklenberg-Strelitz, and Reuss-Greiz, which discharge similar functions but the jurisdiction of which is limited to associations composed wholly of firms located in their respective States, and to State public works departments.

Claims for accident indemnity are passed upon, in the first instance, by the executive committee of the local section of the accident insurance association. Disputes are referred to an arbitration court composed of equal numbers of employers and insured persons with a government official as umpire. Appeals lie from this court to the Imperial Insurance Office. The costs of such trials are small as compared with court costs in the United States and are borne in part by the associations and in part by the government. In practice about eighteen out of every one hundred cases are carried from the committees of the insurance associations to the arbitration courts and, about one-sixth of the decisions rendered by these courts (or about 3 per cent of all claims arising) are appealed to the Imperial Insur-



ance Office. In other words, nearly four-fifths of all accident claims are finally disposed of by the employers' committees, and the decisions of these committees are affirmed in about four-fifths of the cases appealed. Of litigation, in the common law sense, there is none.

The accident insurance system thus far described applies only to serious injuries — those causing disability for more than thirteen weeks. For minor injuries, comprising some five-sixths of all industrial casualties, the following benefits are provided: (1) medical and surgical attendance, medicines, hospital care, and the like; (2) one-half wages from the third day to the end of the fourth week; and (3) two-thirds wages from the beginning of the fifth to the end of the thirteenth week. The increase in the pension after the fourth week is paid by the employer in whose establishment the injury occurred. The remaining benefits are paid out of the sick insurance funds, whereof one-third is contributed by employers and two-thirds by the insured workmen and which are jointly managed by employers and employees. It is estimated that the minor injuries provided for in this way cause about one-sixth of the total expenditure for industrial accidents, so that the employees directly pay some eleven per cent (two-thirds of sixteen per cent) of the cost of accident indemnity. Since, however, employers pay one-third of the sick insurance premiums, and since accident relief represents but a small part of the expenditures of the sickness insurance funds, it is believed that employees really contribute not more than eight per cent of the whole cost of accident indemnity.<sup>554</sup>

This contributory feature of the German plan was adopted not so much to lighten the burden upon employers, as for administrative reasons. The accident insurance associations must be very large, both in numbers and in territorial extent, to distribute the heavy burden of accident relief. Such organizations are at a disadvantage in admin-



istering the great number of small benefits necessitated by minor injuries, and they are also much less efficient in detecting simulation and malingering than are small local societies of workmen. The contributory principle also secures the active coöperation of the workmen's organization in preventing minor accidents.

#### COMPARISON OF THE BRITISH AND GERMAN SYSTEMS

Even a cursory examination of the British and German indemnity systems, such as is contained in the foregoing pages, shows that the latter is decidedly superior by every test that may fairly be applied.

The German insurance system does, while the British compensation plan does not, provide adequate indemnity in accordance with the principle of occupational risks already expounded. Not only is the British schedule of payments insufficient to make good the wage loss from work accidents, but the absence of provisions for medical attendance and the mode in which the payments are made and secured detract much from the benefits conferred upon injured workmen and their families.

Free medical treatment does more than relieve the victims of work accidents of a heavy financial burden: it secures prompt and expert attention to every case. Both the employers' associations and the sick insurance societies in Germany have a pecuniary interest in restoring the earning capacity and stopping the pension of the injured as soon as possible. Accordingly they maintain hospitals, ambulances, and staffs of accident experts, and see to it that even cuts and bruises, which the workers themselves would ignore, are antiseptically treated, thus forestalling many cases of disability.<sup>555</sup> In Great Britain, where workmen select and pay their own physicians, minor injuries receive no attention until they become serious by infection or aggravation; and even serious cases are often treated by half-

baked general practitioners without special accident experience.

All observers agree that a monthly pension is a far better provision for a workingman's family than a lump-sum payment. Yet death benefits in Great Britain are always paid in lump and disability payments very commonly are commuted into lump sums. To make matters worse ignorant and necessitous claimants are sometimes forced or cajoled into unfair settlements by threats of litigation or the wiles of liability adjusters. These abuses are only partially corrected by the supervision of the county courts and the provisions for the purchase of annuities.

The ultimate payment of all accident liabilities is practically certain under the German plan, whereas insolvency of uninsured employers is by no means rare in Great Britain.

The German plan, far better than its rival, realizes the ideal that the cost of work accidents should ultimately be borne by the consumers of the products that occasioned the accidents. This is accomplished by the system of compulsory employers' insurance, whereby the cost of accident indemnity is distributed over the whole industry and made a fixed charge upon the business, as regular and as calculable as any other operating expense. In Great Britain, where some employers insure their liability and others do not, there is no such uniform distribution, and consequently no such complete shifting of the burden of accident indemnity.

The German system is far more economical. Under the Workmen's Compensation Act, as under the common law, the possibility of ruinous losses obliges most employers, except the very smallest and the very largest, to insure in private companies, with resultant waste and loss hardly less than in the United States. Advertising, solicitors' commissions, and other expenses of competitive underwriting, unknown to the German mutuals, absorb nearly one-fifth of

the premiums paid by employers to the British liability companies.<sup>556</sup> Enterprisers' profits are normally high in the one mode of insurance and permanently absent in the other. Costs of management and of the investigation and settlement of claims are much greater in the case of competing private companies than of mutual associations which enjoy complete monopolies in their respective fields, which pay no managers' salaries, employ no adjusters, and conduct investigations through their own members, the local workmen's societies and the police authorities. Expenses of litigation, which are almost *nil* in Germany, continue to be heavy in Great Britain, where the liability companies seek not only to defeat claims but to discourage claimants by fighting doubtful cases. Moreover, the "capitalized reserve" plan, necessary to secure the solvency of a stock company or a voluntary association, adds greatly to the current cost of insurance in Great Britain. Lastly the German government assumes a far larger share of the purely administrative expenses of accident indemnity than does the British. The net result is that of every dollar paid in premiums to the British liability companies hardly more than fifty cents finally reaches the beneficiaries;<sup>557</sup> whereas of each dollar collected by the German employers' associations nearly eighty-seven cents is ultimately paid to injured workmen and their dependents.<sup>558</sup> In other words, the waste of the British plan is four times as great as that of the German system.

The German plan is far more effective in promoting accident prevention. The premium tariffs of the British liability companies are rather crudely based on occupations and make little attempt to discriminate between establishments of the same class. Paying a flat rate, the employer has little incentive to prevent accidents in his own establishment, and, though interested in reducing the trade risks of all establishments in his own class, he has no means of in-

fluencing his fellow employers. The insurance companies possess no such equipment for the study and enforcement of accident prevention as is available to employers' associations. The insurance companies, moreover, are deterred by the fear of losing patronage from exerting adequate pressure upon their clients. The Workmen's Compensation Act has had some effect in stimulating large employers, who are their own insurers, to adopt preventive measures, and it has lessened opposition to the enforcement of safety laws; but its results in both directions have been disappointing to its advocates.<sup>559</sup>

On the other hand, the German system of establishment risk tariffs penalizes the careless and rewards the careful employer. The associations not only have a strong incentive to keep down assessments by reducing the number of accidents, but, composed as they are of similar establishments, they are in a position to devise, and to enforce, effective measures to that end. In this work of prevention the associations are aided not only by efficient government inspectors but by the very full and well-digested records of the Imperial Insurance Office — records incomparably superior to the accident statistics of any other country. These facts, together with German thoroughness and scientific method in applying experience to practical problems, largely account for the long lead of the German Empire in the matter of accident prevention.

Not all the shortcomings of the British Workmen's Compensation Act are inherent in the character of the plan of itself. It would be entirely practicable, without altering the fundamental features of the law, to increase the compensations paid, to provide medical care at the expense of employers, to require that all payments be made in weekly or monthly installments, and to make insurance of liability obligatory upon all employers. But no private insurance plan can rival the economy of the German system of com-

pulsory employers' insurance in homogenous mutual associations, or the efficiency of that system in accident prevention. The great superiority of the German system in these two vital particulars is recognized by all students of accident indemnity.<sup>560</sup>

In point of economy the Insurance Institution of Norway is the equal of the German mutuals, but it is by no means so efficient for accident prevention. A part of its shortcomings are gratuitous, being due to the administration of insurance and inspection by separate bureaus with no close correlation between them.<sup>561</sup> Were the two functions combined and inspectors' reports made the basis of establishment risk ratings, better results would probably be attained. Still, no governmental department can have the same intimate familiarity with working-place conditions, nor the same power of discipline as are possessed by the German mutuals.



## VI

### INDEMNITY LEGISLATION IN THE UNITED STATES

The employers' liability situation in Iowa, already described, is of a piece with that of the country at large, for the United States still holds the unenviable distinction of maintaining the least enlightened system of accident indemnity in Christendom. Similarly, the reform movement which has lately gathered way in our own State is but one manifestation of a nation-wide awakening. Within the space of three years, commissions to investigate the question and recommend legislation have been appointed by twenty-four States and by the Federal government,<sup>562</sup> and legislation on the lines suggested by European experience has been enacted in sixteen Commonwealths.<sup>563</sup> In the single legislative year of 1911 twenty-three States<sup>564</sup> either enacted statutes upon principles novel to American jurisprudence or created commissions to consider the advisability of such legislation. A compensation act is pending in Congress, and the reports of fourteen State commissions are to be acted upon during the coming sessions of the legislatures.

All this activity, extending literally from Maine to California, and from North Dakota to Texas, gives to the movement in Iowa a more than local significance and augurs that a State which holds fast to the common law principles of accident relief will shortly find itself out of line with the nation at large.

Since the campaign for employers' liability reform in Iowa is thus seen to be part of a national movement, spring-

ing from the same causes, dealing with the same problems, and subject to much the same limitations as the similar campaign in other States, a review of what has been done or attempted in these other States may contribute to an understanding of what can and should be done in Iowa.

The results of the reform movement to date (1912) are: (1) an awakened public interest, evidenced in the legislative activity above noted; (2) the reports of twelve commissions; and (3) sixteen workmen's compensation or insurance statutes.

#### WORK OF THE COMMISSIONS

The commissions which have thus far reported are those of Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New York, Ohio, Washington, Wisconsin, and the United States. The commissions still in existence are similar in powers and functions, so that a summary of the reports already issued will sufficiently illustrate the work of all the commissions that have been created.

Seven of the commissions — those of Illinois, Massachusetts, Michigan, New York, Ohio, Wisconsin, and the United States — undertook original investigations into the actual working of the then existing laws. The scope and manner of these investigations is indicated by the condensed outline here given.

Very imperfect accident records were obtained for Manhattan Borough and Erie County, New York; Cuyahoga County, Ohio; Cook County, Illinois; and Milwaukee County, Wisconsin. These records cover the number of fatal and serious accidents occurring in certain employments within specified time limits, the wages of the workmen killed or injured, the number of dependents, the medical and funeral expenses incurred, the compensation received from employers (and from other sources in the New York investigations), the time and mode of settlement, and the eco-

conomic effects of the accident upon the family. It is not to be understood that all of the inquiries covered the same ground or that all these facts were ascertained as to each accident case investigated, but only that each of the foregoing points was included in one or more of the investigations.

Similar data, still more incomplete but for a much greater number of accidents, were gathered by the State bureaus of labor in Illinois, Minnesota, New York, and Wisconsin, and were utilized by the commissions of these States.

The accident experience of 52 large employers in New York, of 120 in Massachusetts, and of 466 in Michigan was obtained to show the expenditure incurred by employers on account of work accidents and the proportion thereof that actually reached the beneficiaries. The New York and Minnesota commissions obtained similar data, on a far greater scale, from the principal casualty and employers' liability companies doing business in those States. The Illinois commission examined the files of leading personal injury lawyers to ascertain what proportion of the damages recovered are absorbed by the fees of counsel for the plaintiffs. The New York commission made use of similar information gathered by the State Department of Labor. The Federal commission obtained and tabulated the experience of railroad companies operating approximately one-half of the railway mileage of the United States.

These investigations were hampered by the limited time and money at the disposal of the commissions, by the wholly inadequate accident records of the States in which they were conducted, and by the failure of some of the commissions <sup>565</sup> to employ trained investigators even when the funds to do so were available. The usefulness of the data secured was further gratuitously impaired by the want of intelligent editing. The published statistics in many cases are neither classified nor adequately tabulated. The tables

presented are often not clearly explained. Few of the reports are conveniently indexed, or summarized, or provided with analytical tables of contents. Ostensibly intended for the use of busy legislators, most of the reports are little better than unorganized magazines of facts from which intelligible information can be collated only with infinite labor.

Despite these limitations the reports mentioned, together with those of the Pittsburgh Survey, are altogether the most authentic and considerable extant source of information on the actual working of employers' liability in the United States.

All the commissions, save that of Washington, held public hearings, took testimony, and sent questionnaires to employers, labor union officers, lawyers, judges, and others, not so much with a view to discover the evils to be remedied as to test and stimulate public interest in the proposed legislation.

Seven commissions <sup>566</sup> reported on foreign systems of accident indemnity, not at first hand but from secondary sources and for the purposes of obtaining suggestions for the measures they meant to propose and of supporting their own recommendations by the experience of other countries.

Since all of the commissions proposed radical departures from the existing legal system it was deemed essential to assure the legislatures that the recommendations made could be enacted into law. Accordingly, seven of the commissions submitted briefs, prepared by members of the commissions or by counsel employed for that express purpose and covering the constitutional questions involved. The New Jersey commission sought to attain the same end by means of a questionnaire to judges and prominent attorneys; while in Massachusetts resort was had to the happy expedient, impossible in other States, of requiring the Supreme Court to commit itself in advance of legislation.

The recommendations made by the several commissions,

and the legislative action thereon, are exhibited in the following table:

TABLE III  
RECOMMENDATIONS OF COMMISSIONS

COMMISSIONS	RECOMMENDATIONS	ENDORSED BY	LEGISLATION
Illinois	Compensation bill 2 Insurance bills	Majority <sup>567</sup>	Compensation Act
Iowa	Compensation bill	Majority <sup>568</sup>	
Maryland	Various bills	Individuals <sup>569</sup>	Permissive Act
Massachusetts	1 Compensation bill	Individuals <sup>570</sup>	Insurance Act
Michigan	Compensation bill	Entire Commission	Compensation Act
Minnesota	Compensation bill	Majority	None
New Jersey	Compensation bill	Entire Commission <sup>571</sup>	Compensation Act
New York	2 Compensation bills	Majority <sup>572</sup>	1 Compensation Act 1 Permissive Act
Ohio	Insurance bill	Majority <sup>573</sup>	Insurance Act
United States	Compensation bill	Entire Commission	None
Washington	Insurance bill	Entire Commission	Insurance Act
Wisconsin	Compensation bill	Entire Commission	Compensation Act

#### LEGISLATION ENACTED

Of the sixteen statutes thus far enacted, eight are based upon the recommendations of investigative commissions; the rest were passed without prior study by such bodies.<sup>574</sup> Five <sup>575</sup> establish accident insurance systems of widely varying types; the others are compensation acts after the British model, though differing from each other, and from their common prototype in many particulars. All seek to provide prompt, certain, and definite indemnity, irrespective of negligence, for all accidents occurring in the employments cov-



ered, and to secure the determination of claims, so far as possible, by non-litigious proceedings. The more important features of the new legislation are shown in the outline below, and in the accompanying tables. It will be observed that the compulsory Workmen's Compensation Act of New York and the Montana Coal Miners' Insurance Act, though held invalid by the courts, are here included for the sake of comparison.

#### BASIS OF RECOVERY

As to injuries within their scope all of the acts under review give compensation irrespective of fault. But thirteen States make "gross negligence", "wilful misconduct", or "intention to inflict injury on self or others" on the part of the injured person a bar to recovery;<sup>576</sup> and eight grant additional compensation, or additional rights of action, for injuries caused by the employer's violation of the safety acts or by his personal gross negligence or deliberate intention to cause the injury.<sup>577</sup>

#### SCOPE OF INDEMNITY ACTS

The statutes under review differ somewhat widely in scope, though none is so comprehensive as most of the European systems. The Montana act is restricted to coal mine workers.<sup>578</sup> The acts of Arizona, Illinois, Kansas, Nevada, New Hampshire, New York, and Washington are limited to specified employments declared to be especially hazardous.<sup>579</sup> The laws of Massachusetts, Michigan, and Rhode Island exclude farm laborers and domestic servants.<sup>580</sup> The Ohio and Rhode Island statutes apply only to employers of five or more persons; and that of Kansas only to employers of fifteen or more workmen.<sup>581</sup> Finally, the acts of California, Maryland, New Jersey, and Wisconsin extend to all employments.<sup>582</sup> All employers of the State and its subdivisions are included in California, Michigan, and Wisconsin, and in Washington if engaged in work of an extra-

TABLE IV  
INDEMNITY LEGISLATION IN THE UNITED STATES

STATE	YEAR OF ACT	CHARACTER OF PLAN	SCOPE OF ACT		
			EMPLOYMENTS COVERED	INJURIES COVERED	EMPLOYEES INCLUDED
Arizona	1912	Compulsory compensation	Specified dangerous employments	All arising out of and in course of employment	All in specified dangerous employments
California	1911	Elective compensation. Compulsory on State and its subdivisions	All	All growing out of employment	All except casual
Illinois	1911	Elective compensation	Specified dangerous employments employing at least 15 workmen	All arising out of and in course of employment	All exposed to necessary hazards of business, casual excepted
Kansas	1911	Elective compensation	Specified dangerous employments	All arising out of and in course of employment	All regularly engaged in the business
Maryland	1912	Elective insurance	All	All arising out of and in course of employment	All employees
Massachusetts	1911	Elective insurance	All except domestic servants and farm laborers	All arising out of and in course of employment	All except casual employees
Michigan	1912	Elective. Compulsory for State and its subdivisions. Compensation or insurance	All except domestic servants and farm laborers	All arising out of and in course of employment	All but casual employees
Montana	1909	Compulsory insurance	All in coal mines and washers	All in course of employment from causes arising therein	All except office employees
Nevada	1911	Compulsory for employer. Elective for employee. Compensation	Specified dangerous employments	All arising out of and in course of employment	All engaged in manual or mechanical labor
New Hampshire	1911	Elective compensation	Specified dangerous employments	All arising out of and in course of employment	All engaged in manual or mechanical labor
New Jersey	1911	Elective compensation	All	All arising out of and in course of employment	All
New York	1910	Compensation. Compulsory on employer, elective for employee	Specified dangerous employments	All arising out of and in course of employment	All manual and mechanical laborers in specified employments
Ohio	1911	Elective for employer. Compulsory for employee if employer elects Coöperative insurance	All establishments employing 5 or more workmen	All sustained in course of employment	All
Rhode Island	1912	Elective compensation	All but domestic service or agriculture and employers of less than 6 workmen	All arising out of and in course of employment	All but casual and those earning over \$1800 annually
Washington	1911	Compulsory insurance	Specified dangerous employments	All sustained in course of employment	All in listed employments, & others when employer and workmen elect under law
Wisconsin	1911	Elective. Compensation. Compulsory on State and municipalities	All	All growing out of employment	All except casual

TABLE IV — CONTINUED

STATE	ELECTION		DEFENSES ABROGATED	LIABILITIES ABROGATED
	BY EMPLOYER	BY EMPLOYEE		
Arizona	Compulsory	Election after injury	Common law defenses abrogated	Acceptance of compensation excludes other liabilities
California	Affirmative by written notice. Compulsory on public bodies	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant. Contributory negligence becomes comparative	Election under act cancels all other liabilities of employer
Illinois	Presumed unless notice to contrary	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant, contributory negligence becomes comparative	Election under act cancels all other liabilities of employer
Kansas	Affirmative by statement	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant, contributory negligence	Election under act cancels all other liabilities of employer
Maryland	By contract with employees filed with Insurance Commissioner	By contract with employer	Contract must provide for liability regardless of negligence	Contract abrogates all other liabilities
Massachusetts	Affirmative by written notice	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant. Contributory negligence subject for jury	Election under act cancels all other liabilities of employer
Michigan	Affirmative by written notice	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant rule, contributory negligence	Election under act excludes all other liabilities
Montana	Compulsory	Contribution compulsory, damage suit optional after injury	No provision	Acceptance of benefit releases employer from all other liabilities
Nevada	Compulsory	Election after injury	Assumption of risk and fellow servant rule abolished. Contributory negligence graded comparatively	Acceptance of compensation excludes other liabilities
New Hampshire	Affirmative by notice	Election after injury	If employer does not elect under act: assumption of risk, fellow servant	Acceptance of compensation excludes other liabilities
New Jersey	Presumed unless notice to contrary	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant rule, contributory negligence	Election cancels all other liabilities of employer
New York	Compulsory	Election after injury	Not mentioned	Application for benefit under act releases employer from all other liabilities
Ohio	Affirmative by paying premiums	Compulsory if employer elects	Assumption of risk, fellow servant rule, and contributory negligence abolished	Election under act cancels all other liabilities of employer
Rhode Island	Affirmative by written notice	Presumed unless notice to contrary	If employer does not elect under act: assumption of risk, fellow servant rule, contributory negligence	Election under act cancels all other liabilities of employer
Washington	Compulsory	Compulsory	If employer default in premium payments, workmen may maintain action at law, and assumption of risk and fellow servant rule are abrogated. Contributory negligence made comparative	State insurance benefits exclude all others
Wisconsin	Affirmative by notice	Presumed unless notice to contrary. Compulsory on public employees	If employer does not elect under act: assumption of risk, fellow servant	Election under act cancels all other liabilities of employer

TABLE IV — CONTINUED

STATE	GROSS NEGLIGENCE OR WILFUL MISCONDUCT		FUNDS PRO- VIDED BY	EMPLOYER'S VOL- UNTARY RELIEF	ADMINIS- TRATION
	OF EMPLOYER	OF EMPLOYEE			
Arizona	No provision	No provision	Employer	Valid if not less favorable to employee than act	Attorney General
California	Gives employee option of damage suit	Forfeits compensation	Employer	Valid but benefits are in addition to those under act	Industrial Accident Board
Illinois	Gives employee option of damage suit	Forfeits compensation	Employer	Valid if not less favorable to employee than act	
Kansas	Gives employee option of damage suit	Forfeits compensation	Employer	Valid if as much as benefit covered by employee's contribution plus benefit under act	
Maryland		Forfeits compensation	Employer, one half. Employees, one half		Employers insurance fund by Insurance Commissioner
Massachusetts	Doubles compensation to employee	Forfeits compensation	Employer	No other benefits affect liability under act	Industrial Accident Board
Michigan	Not mentioned	Forfeits compensation under act. Gives contributory negligence defense at law to employer	Employer	No other benefits affect liability under act	Industrial Accident Board
Montana	Not mentioned	No provision	From employer, 1c per ton mined from employee 1% of wages	Not mentioned	State Auditor
Nevada	No provision	No provision	Employer	Not mentioned	
New Hampshire	Gives employee option of damage suit	Forfeits compensation	Employer	Not mentioned	
New Jersey	No provision	Forfeits compensation	Employer	Not mentioned	Court of Common Pleas
New York	No provision	Forfeits compensation	Employer	Not mentioned	
Ohio	Gives employee option of damage suit	Forfeits compensation	From employer 90%, from employees 10% of premium	Not mentioned	State Liability Board of Awards
Rhode Island	No provision	Forfeits compensation	Employer	Must be as favorable to employee as act, and approved by Superior Court	Superior Court
Washington	Gives compensation under act and right of damage suit for excess of damage	Forfeits compensation	Employer	Not mentioned	Industrial Insurance Department
Wisconsin	No provision	Forfeits compensation	Employer	Valid but compensation under act not reduced by employee's contribution	Commission

TABLE IV — CONTINUED

STATE	MEDICAL AID	TOTAL DISABILITY	
		COMPENSATION	CONTINUANCE
Arizona	No provision	50% full time wages semi-monthly	During incapacity. Limited to \$4000
California	Limited to 90 days and \$100	65% average weekly wages	Limited to 15 years and 3 years' wages
Illinois	Limited to 8 weeks and \$200	50% average weekly wages \$5 to \$12	Limited to death benefit. Thereafter 8% death benefit yearly
Kansas	No provision	50% average weekly wages \$6 to \$15	During incapacity. Limited to 10 years
Maryland	No provision	50% weekly wages	During disability
Massachusetts	Limited to first 2 weeks	50% average weekly wages \$4 to \$10 Total not to exceed \$3000	500 weeks
Michigan	Limited to first three weeks	50% average weekly wages \$4 to \$10 Total not to exceed \$4000	500 weeks
Montana	At discretion of State Auditor	\$1 for each working day paid monthly	During disability
Nevada	No provision	60% average weekly wages	\$3000
New Hampshire	No provision	50% average weekly wages Limited to \$10	300 weeks
New Jersey	Limited to first 2 weeks and \$100	50% average weekly wages \$5 to \$10	400 weeks
New York	No provision	50% average weekly wages Limited to \$10	8 years
Ohio	At discretion of Board but limited to \$200	66 2-3% average weekly wages \$5 to \$12	During disability
Rhode Island	Limited to 2 weeks	50% average weekly wages \$4 to \$10	500 weeks
Washington	No provision	Not married \$20 per month Married \$25 per month Children each \$5 per month Total limited to \$35 per month	During disability
Wisconsin	Limited to 90 days	65% average weekly wages \$4.69 to \$9.38 Full wages if more is required	15 years or 4 times average annual wage



TABLE IV — CONTINUED

STATE	PARTIAL DISABILITY		WAITING TIME	SPECIFIED INJURIES
	COMPENSATION	CONTINUANCE		
Arizona	50% wage loss semi-monthly	During disability. Limited to \$4000	2 weeks. Compensation from date of accident	No provision
California	65% weekly wage loss	15 years	1 week	No provision
Illinois	50% weekly wage loss	During disability	1 week	For permanent disfigurement. Maximum limit ¼ death benefit
Kansas	25% to 50% weekly wage loss. \$3 to \$12	During disability. Limited to 10 years	2 weeks	No provision
Maryland	Difference between total disability benefits and earnings after injury	During disability	1 week	Specific fractions of total disability payments
Massachusetts	50% weekly wage loss. Limited to \$10	300 weeks	2 weeks	Specified compensation
Michigan	50% weekly wage loss. Limited to \$10	300 weeks	2 weeks. Compensa- tion from date of accident if disability continues 8 weeks	Specified compensation
Montana	No provision except for specific injuries		12 weeks	Specified compensation
Nevada	60% wage loss	\$3000	10 days	Specified compensation
New Hampshire	50% weekly wage loss. Limited to \$10	300 weeks	2 weeks	No provision
New Jersey	Proportionate to disability weekly \$5 to \$10	300 weeks	2 weeks	Specified compensation
New York	Not to exceed wage loss nor be less than ½ wage loss. Limited to \$10	8 years	2 weeks	No provision
Ohio	66 2-3% weekly wage loss. \$5 to \$12	6 years or \$3400	1 week	No provision
Rhode Island	50% weekly wage loss. Limited to \$10	300 weeks	2 weeks	Specified compensation
Washington	Monthly sum proportionate to disability	\$1500	Not mentioned	Specified compensation
Wisconsin	65% weekly wage loss	15 years or \$3000	1 week. Compensa- tion from beginning if injury lasts 4 weeks	No provision

TABLE IV — CONTINUED

STATE	DEATH				
	TOTAL DEPENDENTS	PARTIAL DEPENDENTS	ALIEN DEPENDENTS	MODE OF PAYMENT	NO DEPENDENTS
Arizona	1200 times daily wages. Only to widow and minor children. \$4000 limit	Same as to total dependents	Not mentioned	Lump sum	Medical and burial expenses
California	3 years' wages \$1000 to \$5000	Proportionate to dependency	Not mentioned	Weekly.	Burial expenses. Maximum \$100
Illinois	50% wages for 8 years \$1500 to \$3500	Proportionate to dependency	Not mentioned	Weekly Commutable to lump sum by order of court	Burial expenses. Maximum \$150
Kansas	3 years' wages \$1200 to \$3600	Proportionate to dependency	Non-resident aliens receive sum not to exceed \$750	Lump sum	Burial expenses. Maximum \$100
Maryland	3 years' wages. Minimum limit \$1000	3 yrs.' wages of deceased less 6 yrs.' wages of dependent	Not mentioned	Lump sum or weekly according to contract	Medical and burial expenses \$75 to \$100
Massachusetts	50% wages for 300 weeks \$1200 to \$3000	Proportionate to dependency	Not mentioned	Weekly. Commutable to lump sum after 6 months	Burial expenses. Maximum \$200
Michigan	50% weekly wages for 300 weeks \$4 to \$10	Proportionate to dependency	Not mentioned	Weekly	Medical and burial expenses. Maximum \$200
Montana	\$3000	\$3000	Non-resident aliens receive no compensation	Lump sum	
Nevada	3 years' wages \$2000 to \$3000	Half the compensation to total dependents	Not mentioned	Lump sum	Burial expenses. Maximum \$300
New Hampshire	150 weeks' wages. Maximum limit \$3000	Proportionate to dependency	No compensation to aliens unless residents of State	Lump sum	Burial expenses. Maximum \$100
New Jersey	Widow 25% w'kly wages. Orphans 25 to 60% w'kly wage. Widow and 1 child 40% weekly wage. Each child to 4, 5% extra. 300 weeks. \$5-\$10 per week	Grand parents, grandchildren, incapacitated or minor brothers or sisters, 25% w'kly wages 300 w'ks	No compensation to aliens not living in United States	Weekly. Commutable to lump sum by order of court	Burial expenses. Maximum \$200
New York	1200 times daily wages Maximum limit \$3000	Proportionate to dependency	Not mentioned	Lump sum	Medical and burial expenses. Maximum \$100
Ohio	66 2-3% 6 years' wages \$1500 to \$3400 Funeral \$150 additional	36 2-3% w'ges for period det'm'n'd by Board. Funeral \$150 additional	Not mentioned	Weekly. Commutable to lump sum by Board	Medical and hospital expenses, limited to \$200. Burial \$150
Rhode Island	50% weekly wages for 300 weeks \$4 to \$10	Proportionate to dependency	Not mentioned	Weekly	Last sickness and burial expenses. Maximum \$200
Washington	Widow \$20 a mo. till remarriage. \$240 dower. Children \$5 each additional. Orphans \$10 a mo. each. Maximum \$35 a mo. Funeral \$75	50% average monthly support received from deceased	Non-resident aliens except father and mother not considered	Monthly. Substitution of lump sum if beneficiary be or move out of State	Burial expenses. Maximum \$75
Wisconsin	Four years' weekly wages \$1500 to \$3000	Proportionate to dependency	Act gives non-resident aliens same benefits	Weekly. Board may commute to lump sum	Burial expenses. Maximum \$100

hazardous nature.<sup>583</sup> The employments most usually enumerated as especially dangerous are: railway construction and operation (except as to inter-State commerce), manufacturing of every sort wherein power-driven machinery is used, logging, stevedoring, the erection, repair and demolition of buildings, bridges and other structures (sometimes of specified dimensions), tunnel driving, well drilling, sub-aqueous or sub-terranean construction, and work necessitating dangerous proximity to explosives. The list of enumerated employments varies, of course, with the industrial character of the several States.

All employees in the employments covered appear to be within the benefits of the Maryland, Nevada, Ohio, and Washington statutes.<sup>584</sup> The acts of Arizona, Montana, New Hampshire, and New York are limited to persons engaged in mechanical or manual labor,<sup>585</sup> and the Illinois act to those who are exposed to the necessary hazards of the extra-hazardous employments.<sup>586</sup> California, Illinois, Kansas, Massachusetts, Michigan, New Jersey, Rhode Island, and Wisconsin exclude casuals and persons employed otherwise than in the ordinary course of the employer's business.<sup>587</sup> Rhode Island also excepts employees whose remuneration exceeds \$1800 yearly.<sup>588</sup>

Most of the statutes under review provide compensation only for "personal injury by accident arising out of and in the course of the employment".<sup>589</sup> This language, borrowed from the British Workmen's Compensation Act, has been judicially construed and has acquired a technical connotation. Under the British act three conditions must concur to justify indemnity: (1) the injury must have been produced by an unforeseen and undesigned event; (2) it must have been sustained by an employee acting as such; and (3) it must have been caused by a risk incident to the work which it was the employee's duty to perform.<sup>590</sup> The Maryland, Ohio, Washington, and Wisconsin statutes, which allow re-

covery for all accidental injuries sustained in the course of employment, are apparently broader in scope than their British prototype.<sup>591</sup>

A principal employer who sublets any part of the work undertaken by him in the line of his own trade or business, to be performed upon the principal's premises or under his control, is, by the acts of Illinois, Kansas, Massachusetts, Nevada, and New York, answerable to the employees of his contractor or sub-contractor as if they were employed directly by him.<sup>592</sup> In Washington the principal, under such circumstances, is surety for the contractor or sub-contractor,<sup>593</sup> and in the other States just named he has a right to recover from the intermediate employer the compensations paid on his behalf.

#### ELECTION

One of the gravest difficulties that confronted the commissions in drafting bills, and the legislatures in enacting them, was how to make the legislation effective upon the persons intended to be included therein. On the one hand, if the acts were compulsory, they might be held by the courts to deprive employers or employees of rights guaranteed under the State and Federal constitutions. On the other hand, if permissive only the laws would have no substantial effect — employers can, and some of them do, without express statutory authorization, compensate accidents sustained in their service irrespective of "fault". In the face of this dilemma, three different courses were adopted by the several States which have enacted indemnity legislation. These methods may be termed, respectively, the compulsory, the quasi-elective, and the permissive plans.

Despite constitutional doubts, Arizona, Montana, Nevada, New York, and Washington made their indemnity acts compulsory upon employers,<sup>594</sup> and Washington denied any election (except as to injuries caused by the master's deliberate intention) to employees as well.<sup>595</sup> Of these com-



pulsory acts, however, one (that of Montana) is restricted to coal miners and the others to enumerated dangerous trades; while two have been overthrown by the courts. The acts of California, Michigan, and Wisconsin are compulsory only as respects public employers and employees.<sup>596</sup>

Ten States sought to avoid constitutional objections, and at the same time give practical effect to their enactments, by making the acts elective in form while imposing heavy penalties upon those employers or employees who elect to stand upon their common law rights.

In pursuance of this plan, employers who fail to bring themselves within the statutes are stripped of some or all of their common law defenses; whereas employers who elect to compensate work injuries in accordance with the acts are either saved these defenses or (as in New Hampshire and Ohio) are altogether exempted from liability suits founded on ordinary negligence.<sup>597</sup> The fellow-servant and assumption of risk doctrines are thus conditionally abrogated by California, Illinois, Kansas, Massachusetts, Michigan, New Hampshire, New Jersey, Ohio, Rhode Island, and Wisconsin (the fellow-servant rule is repealed by Wisconsin only as to employers of four or more persons in the same common employment).<sup>598</sup> The defense of contributory negligence is similarly repealed by Massachusetts, Michigan, New Jersey, Ohio, and Rhode Island,<sup>599</sup> and is modified by California, Illinois, Kansas, and New Hampshire.<sup>600</sup>

In most of the States which have quasi-elective acts the employer who wishes to avail himself thereof must make affirmative election by filing written notice with the proper administrative authority.<sup>601</sup> In Illinois and New Jersey, however, such election is presumed unless the employer gives formal notice to the contrary.<sup>602</sup> Affirmative election once made is usually binding for one year, and thereafter is annually renewed of its own force unless notice of withdrawal is given before the expiration of the period for which



election was made. In eight States the employer's election to come under the statute carries with it that of his employees unless they severally notify him to the contrary.<sup>603</sup> In New Hampshire the employer's affirmative election relieves him of common law liability<sup>604</sup> and in Ohio the mere continuance in an employment with notice that the employer has subscribed to the State Insurance Fund constitutes a binding waiver, on the part of the employees, of all rights save those under the statute.<sup>605</sup> Arizona, Montana, Nevada, and New York permit the employee to elect after injury whether he will take compensation under the statutes or pursue his remedy at common law or under the employers' liability acts of those States.<sup>606</sup> California, Illinois, Kansas, New Hampshire, and Ohio allow such election as to injuries caused by the employer's violation of the safety laws.<sup>607</sup>

Maryland and New York have enacted permissive legislation, defining the terms upon which employers may, by providing voluntary accident relief, exempt themselves from their common law and statutory liability for ordinary negligence.<sup>608</sup> It is probable that some large employers in both States will take advantage of these statutes, but the acts are not so drawn as to exert effective pressure in the direction of liability without fault. The Maryland law of 1912, herein classed as indemnity legislation, is of this permissive character; whereas the New York statute discussed throughout this chapter is the compulsory workmen's compensation act of 1910 which was held invalid by the Court of Appeals.

#### SCHEDULES OF COMPENSATION

The indemnities provided include medical care, funeral, death, and disability benefits.

Medical, surgical and hospital services and supplies for injured workmen are provided by eight of the sixteen statutes. But such relief is limited to ninety days and a total

of \$100 in California, to eight weeks and \$200 in Illinois, to two weeks in Massachusetts and Rhode Island, to three weeks in Michigan, to two weeks and \$100 in New Jersey, to \$200 in Ohio, and to ninety days in Wisconsin.<sup>609</sup>

Reasonable funeral expenses, commonly limited to \$100, are provided for those who leave no dependents by fifteen States, and for all who die as the result of work accidents by only Ohio and Washington.<sup>610</sup>

Death benefits<sup>611</sup> to persons wholly dependent upon the deceased are three years' wages in California, Kansas, Maryland, Massachusetts,<sup>612</sup> Michigan,<sup>613</sup> Nevada, New Hampshire,<sup>614</sup> and Rhode Island;<sup>615</sup> and four years' wages in Arizona,<sup>616</sup> Illinois, New York,<sup>617</sup> Ohio,<sup>618</sup> and Wisconsin. In New Jersey and Washington the death benefits vary according to the number of dependents, ranging from one-fourth to three-fifths wages for three hundred weeks in the former State and from \$20 to \$35 per month in the latter. The abortive coal miners' insurance act of Montana provided a fixed benefit of \$3,000. Those States which make compensation proportionate to wages prescribe certain maxima and minima, the lowest sum payable in any State being \$1,000 (in Maryland) and the highest \$5,000 (in California). Where there are no wholly dependent persons, compensation proportionate to dependency is, in most cases, allowed to partial dependents if there are any. Death payments are, by seven of the statutes, made in lump;<sup>619</sup> in the other States surviving dependents receive periodical pensions, but such pensions are, under certain restrictions, commutable into lump sums.<sup>620</sup>

To the totally disabled<sup>621</sup> most of the acts grant weekly or bi-weekly payments, ranging from fifty per cent of full wages in ten States to sixty-six and two-thirds per cent in Ohio. The California act allows full wages in cases of such utter helplessness as to require the constant attendance of a nurse. The Washington law bestows \$20 to \$35 per month

according to the number of persons dependent upon the injured workman; while the defunct coal miners' insurance act of Montana gave a flat monthly stipend of \$1 for each working day. The periodic payments usually are subject to certain minima and maxima; and the duration of such payments is limited to fifteen years in California and Wisconsin; to ten years in Kansas, Massachusetts, Michigan, and Rhode Island;<sup>622</sup> to eight years in Illinois, New Jersey,<sup>623</sup> and New York; and to six years in New Hampshire.<sup>624</sup> Illinois, however, awards an annual pension of eight per cent of the death benefit after the expiration of the eighth year. Lastly, the aggregate disability benefits for any one injury are restricted to the amount of the death benefit by the acts of Arizona, California, Illinois, Massachusetts, Michigan, Nevada, and Wisconsin. Payments continue until death in Ohio and Washington.

Indemnity for partial incapacity<sup>625</sup> usually bears the same proportion to the total disability benefits as the reduced earning capacity, in the same or a different employment, bears to the former earnings of the injured. The Nevada and Wisconsin acts, however, consider only the diminution of earning capacity in the employment in which the injury was sustained. Under the Maryland act, compensation for partial disability equals the total disability benefit diminished by earnings (actual or potential) after the injury. For certain enumerated injuries, constituting permanent partial disability, Maryland, Michigan, New Jersey, and Rhode Island award fixed percentages of wages for specified lengths of time, and Washington grants specified lump sums.<sup>626</sup> For similar injuries Massachusetts and Nevada grant indemnities additional to the partial disability benefits; while the Illinois act allows such additional compensation, not to exceed one-fourth of the death benefit, for permanent disfigurements.<sup>627</sup>

A "waiting period", during which no disability benefits

are paid, is exacted by most of the compensation acts.<sup>628</sup> This period is one week in California, Illinois, Maryland, Ohio, and Wisconsin, ten days in Nevada, two weeks in Arizona, Kansas, Massachusetts, Michigan, New Hampshire, New Jersey, New York, and Rhode Island, and twelve weeks under the Montana coal miners' insurance act. But if disability continues for more than two weeks in Arizona and Michigan, four weeks in Wisconsin, or three months in Montana, compensation is allowed from the date of the accident. These "waiting periods" are, of course, intended to discourage malingering or simulation by the slightly injured. As a further check upon feigned disabilities, pensioners are required, upon demand of the employer or insurer, to submit themselves periodically to medical examination.<sup>629</sup>

To protect the beneficiaries from improvident contracts or unconscionable bargains, practically all of the compensation acts make indemnities thereunder non-assignable and exempt from lien, attachment, or execution.<sup>630</sup> The best protection is, of course, the payment of all indemnities in weekly installments — a safeguard which is sufficiently secured by few of the American statutes.

#### RESPONSIBILITY FOR PAYMENTS

With respect to responsibility for the payment of the foregoing indemnities nearly every plan employed in Europe has been adopted by one or more of the American commonwealths.

Arizona, California, Illinois, Kansas, Nevada, New Jersey, New York, Rhode Island, and Wisconsin follow Great Britain in making each employer directly responsible for the compensation of injuries sustained in his employment and in not requiring any insurance of liability.<sup>631</sup> Insurance is, however, expressly permitted by four of these States<sup>632</sup> and is doubtless lawful in all of them. Some se-



curity is afforded, except in Kansas, by making accrued indemnities preferred claims upon the employer's assets.<sup>633</sup>

Two States make the employer directly responsible for compensations, but require him to secure the payment thereof in some manner designated by the statutes. In New Hampshire the employer who accepts the compensation act must satisfy the Commissioner of Labor that he is financially able to comply with its provisions or must file with the Commissioner a bond to discharge all liability incurred thereunder.<sup>634</sup> Michigan allows four options: (1) direct compensation by the employer upon satisfying the Industrial Accident Board of his solvency and pecuniary responsibility; (2) insurance in any liability company authorized to assume such risks in the State; (3) insurance in any employers' insurance association organized under the laws of Michigan; and (4) administration of benefits by the State Commissioner of Insurance.<sup>635</sup> With respect to the last-mentioned option, it is provided that, upon the request of five or more employers who employ not less than three thousand persons subject to the compensation act, the Commissioner of Insurance shall create an accident fund, shall levy and collect premiums in accordance with a risk tariff to be by him constructed, and shall pay all claims which may accrue.<sup>636</sup> Michigan has also a law designed to encourage the formation of employers' mutual insurance associations.<sup>637</sup>

Massachusetts seeks to secure collective, rather than individual, responsibility by means of an employers' mutual called the Massachusetts Employees' Insurance Association — a corporate body which assumes all compensation liabilities of its members.<sup>638</sup> Each subscriber to the Association has one vote and one additional vote for each five hundred employees, but not more than twenty in all. The Board of Directors, elected in the general meeting, is authorized to distribute the members into risk groups, make



risk tariffs, fix rates and collect assessments sufficient in each annual period to meet the indemnities payable in that year. The Association is empowered to make and enforce rules for accident prevention and may doubtless penalize subscribers who fail to comply therewith by increasing their insurance rates. Employers who do not become members of the Association, and who elect to come under the compensation act, must insure in some liability company authorized to do business in the State.

Three American legislatures have adopted the Norway plan of exclusive State insurance. The Montana act of 1909 (since held invalid) was, as already explained, limited to coal mines, and as to these the law was compulsory. Premiums were fixed at one cent per ton of coal and one per cent of pay roll, the latter to be deducted from the wages of employees. The fund so provided was administered by the Auditor of State.<sup>639</sup> State insurance is obligatory, in Ohio upon all employers who accept the compensation plan, and in Washington upon all who carry on any of the enumerated hazardous employments. Risk classes and premium rates are fixed by the statute in Washington, subject to legislative revision. In Ohio the classes and rates are determined by the Liability Board of Awards, which employs a permanent actuary for that purpose. Establishment premiums in both cases are a percentage of pay roll obtained by combining the risk ratings of the several classes of employees. The administrative boards, expressly in Washington and by fair implication in Ohio, are authorized to raise the risk rating of any employer who maintains "unduly dangerous" conditions of employment. Disbursements in both States are made directly by the administrative boards and payment of the assessed premiums into the State fund relieves the employer of every other liability except for wilful wrongs.<sup>640</sup>

Maryland requires an employer who accepts the terms of

the permissive act either to insure his employees against work accidents in some casualty company organized under the laws of that State or to establish a trust fund inviolably appropriated to the purposes of such insurance. The latter option is restricted to employers of not less than fifteen hundred workmen. It will be observed that the Maryland plan provides for "workmen's collective accident" as distinguished from "employers' liability" insurance.<sup>641</sup>

Summing up, it appears that of the fourteen statutes which have thus far survived the courts, eight make the employer individually liable for the compensations provided, two impose individual liability but exact some form of guarantee that the payments will be forthcoming when due, three create collective liability (two by means of State insurance and one by an employers' mutual with an option of stock company insurance), and one allows the substitution of workmen's collective accident insurance for employers' liability.

#### BURDEN OF INDEMNITIES

The burden of indemnifying work accidents is, by thirteen of the statutes under review, imposed exclusively upon the employer. One-tenth of the insurance premiums in Ohio<sup>642</sup> and one-half in Maryland<sup>643</sup> may be deducted from the wages of insured employees. The Montana act allowed coal mine operators to deduct one per cent from the gross earnings of all employees affected by the act.<sup>644</sup> The aggregate of such deductions would probably equal the operators' contribution of one cent per ton of coal.

#### CONTRACTING OUT

Arizona, Illinois, Kansas, and Rhode Island permit the employer to contract out of liability, at either statutory or common law, by establishing a scheme of accident relief —

but only upon the condition that the benefits provided at the employers' expense, exclusive of any contributions from employees, shall at least equal the indemnities secured by the compensation acts.<sup>645</sup> No such scheme is valid in Kansas until certified by the Superintendent of Insurance, nor in Rhode Island unless approved by the Superior Court. California and Wisconsin allow accident benefits additional to those of the compensation acts, but no such benefits affect the employer's liability thereunder.<sup>646</sup> In Massachusetts, Michigan, and Rhode Island no payments from any other source can be considered in awarding indemnities under the compensation laws.<sup>647</sup> Ohio provides but one mode of election — payment of premiums into the State insurance fund — and Washington admits no alternative; contracting out would be impossible under either statute. The remaining compensation acts make no mention of the subject.

#### ADMINISTRATION

California, Massachusetts, Michigan, Ohio, Washington, and Wisconsin have created special commissions, maintained out of the public treasury, and clothed with important supervisory and administrative powers.<sup>648</sup> (See Table V.) The Montana coal miners' insurance, during its brief existence, was administered by the Auditor of State.<sup>649</sup> The other States provide no special machinery for the administration of their indemnity laws. New Jersey, however, has an unpaid permanent Employers' Liability Commission whose duty it is to observe and report upon the operation of the compensation act.<sup>650</sup> Employers who elect under the compensation laws must report settlements of claims, monthly in Illinois and annually in Kansas and New Hampshire, to the labor bureaus of those States.<sup>651</sup> Quarterly reports of settlements and releases under the Maryland Employees' Insurance Act must be made to the

TABLE V  
ADMINISTRATIVE BOARDS

STATES	TITLE OF BOARD	MEMBERS	APPOINTMENT	TERM	SALARY	FUNCTIONS
California	Industrial Accident Board	3	Governor and Senate	4 years	\$3600	Administer Compensation Act. Determine Claims
Massachusetts	Industrial Accident Board	5	Governor and Council	5 years	Chairman \$5000 Others \$4500	Supervise Employers' Insurance Association. Administer Compensation Act. Determine disputes. Collect Accident records
Michigan	Industrial Accident Board	3	Governor and Senate	6 years	\$3500	Administer Compensation Act. Determine disputes. Collect accident records
Montana	Auditor of State					Administer Coal Miners' Insurance Act
Ohio	Liability Board of Awards	3	Governor	6 years	\$5000	Administer Insurance Act
New Jersey	Employers' Liability Commission	6	Governor	2 years	Traveling expenses	Report upon operation of Compensation Act
Washington	Industrial Insurance Department	3	Governor	6 years	\$5000	Administer Insurance Act
Wisconsin	Industrial Commission	3	Governor and Senate	6 years	\$5000	Administer Workmen's Compensation Act and all labor laws. Collect Accident Records

Commissioner of Insurance, and no relief or insurance contract is valid until approved by him.<sup>652</sup>

#### REPORT OF ACCIDENTS

Seven of the compensation laws require industrial accidents to be reported to a State administrative authority.<sup>653</sup> In Massachusetts every injury, fatal or otherwise, must be reported to the Industrial Accident Board within forty-eight hours after its occurrence and the report must state

the name, age, sex, and occupation of the injured employee, the date and hour of the accident, the nature and cause of the injury and such other information as the Board may require. New Jersey and Washington require less complete, but immediate, reports of all injuries; while in Illinois the same requirement applies to fatal injuries only. Michigan allows ten days for a report similar to that demanded by the Massachusetts law. Wisconsin exacts a complete monthly record of disabling injuries, interpreted by the Industrial Commission to mean injuries causing disability for at least seven days. Kansas requires only an annual report to the Factory Inspector—a requirement of no substantial value for statistical or other purposes. To judge from published reports, the commissions of Massachusetts, Washington, and Wisconsin secure fairly complete returns. The New Jersey reports, on the contrary, appear to include but a small proportion of the actual number of work accidents. The Massachusetts records, comprising complete data for all work injuries, are much the most valuable for the purposes, both of accident prevention and of indemnity insurance.

#### ADJUDICATION OF CLAIMS

All of the statutes thus far enacted seek to minimize the delay and expense of litigation.<sup>654</sup> The main provisions looking to this end are summarized in Table VI. It will be noted that in California, Massachusetts, Michigan, and Wisconsin all disputes, and in Ohio and Washington all claims, are determined, in the first instance, by the administrative boards of those States. Awards so made are subject to court review only on questions of law in Massachusetts, and in California, Michigan, Washington, and Wisconsin, only on the grounds that the award was obtained by fraud or was without the jurisdiction of the board or was unsupported by the facts found. The Montana coal miners' insurance law



TABLE VI  
ADJUDICATION OF CLAIMS

STATES	PRIMARY DE-TERMINATION OF CLAIMS	COURT REVIEW	JURY TRIAL	FEES OF CLAIMANTS' ATTORNEYS
Arizona	By agreement, arbitration, reference to Attorney General or action at law	Action at law upon failure of settlement	Allowed in suits at law	Fixed by court. Limited to 25 per cent of award
California	All disputes determined by Industrial Accident Board	Only on grounds of fraud, want of jurisdiction, or insufficiency of facts found to support award	None	No provision
Illinois	By agreement or by Board of Arbitrators with umpire appointed by Court	On appeal from Arbitrators. Trial <i>de novo</i>	If demanded with notice of appeal	Subject to approval of court
Kansas	By agreement or arbitration. Action at law in default of agreement or arbitration	Action at law in default of agreement or arbitration	If demanded with notice of appeal	Subject to approval of court
Maryland	By arbitrators named by parties or by Circuit Court. Award final	None	None	Not mentioned
Massachusetts	By agreement approved by Board. Disputes determined by arbitrators with member of Board as chairman and reviewable by Board	On questions of law only	None	Subject to approval of Industrial Accident Board
Michigan	By agreement approved by Board. Disputes determined by arbitrators with member of Board as chairman and reviewable by Board	On questions of law only, by Supreme Court	None	Subject to approval of Industrial Accident Board

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STATES	PRIMARY DE-TERMINATION OF CLAIMS	COURT REVIEW	JURY TRIAL	FEES OF CLAIMANTS' ATTORNEYS
Montana	By Auditor of State	On questions of jurisdiction only	None	No provision
Nevada	By arbitration or suit at law	Original proceedings or appeal from arbitrators	Allowed	No provision
New Hampshire	By agreement or petition in equity	Original proceeding in equity	None	Subject to approval of court
New Jersey	By agreement or by Court of Common Pleas	Award of Court of Common Pleas reviewable only on questions of law	None	No provision
New York	By agreement, arbitration or action at law	By appeal from arbitration or original action	Allowed	Subject to approval of court
Ohio	By Liability Board of Awards. Findings final on facts	Original proceedings when compensation is denied on grounds going to basis of claim	If demanded in court trials	Fixed by trial judge
Rhode Island	By agreement approved by Superior Court or by petition in equity	Award of Superior Court reviewable only on questions of law or equity	None	No provision
Washington	All claims determined by Industrial Insurance Department	By appeal on grounds of fraud, want of jurisdiction or insufficiency of facts found to support award <sup>655</sup>	Of right as to certain matters. In discretion of court as to others	Subject to approval of court
Wisconsin	All disputes determined by Industrial Commission. Findings of fact final	Only on ground of fraud, want of jurisdiction, or insufficiency of facts found to support award	None	Not to exceed 10 per cent of award without Commission's authorization

similarly vested in the Auditor of State plenary power to determine claims to compensation. In Ohio only a finding

which wholly denies compensation can be reviewed by the courts. New Hampshire, New Jersey, and Rhode Island, which have no proper administrative machinery, provide for the determination of claims, in default of agreement between the parties, by a single judge whose findings of fact are final. In Maryland, a permissive relief scheme may provide for the reference of all disputes to arbitrators whose award is binding upon both parties. Arizona and Illinois require, and Kansas, Nevada, and New York permit, the arbitration of claims before resort is had to the courts. Jury trial, as to claims arising under the compensation or insurance acts, is wholly denied by nine statutes and is somewhat restricted by four. In the further interest of "cheap and speedy justice", ten States provide that the fees of a claimant's attorney shall not be a lien upon any award under the act unless approved by the trial court or by the proper administrative board.

#### CONSTITUTIONAL QUESTIONS

Of the sixteen workmen's compensation or insurance statutes analyzed in the preceding pages but six have thus far run the gauntlet of the State courts. Of these, two have perished at the hands of the highest tribunals of Montana<sup>656</sup> and New York,<sup>657</sup> respectively; while four survived the courts of last resort in the States that enacted them — Massachusetts,<sup>658</sup> Ohio,<sup>659</sup> Washington,<sup>660</sup> and Wisconsin.<sup>661</sup> None has yet passed the Federal Supreme Court. It is, therefore, too early for even a layman to express a positive opinion on the constitutional questions involved in workmen's compensation. None the less, the adjudged cases at least define the issues presented and afford grounds for something more than an intelligent guess as to the type of legislation likely to be upheld by the courts of Iowa.

The constitutional rocks most to be feared by those who would frame a rational system of indemnity for work acci-

dents are the "due process" and "equal protection" clauses and the guarantees of jury trial.

*Due Process of Law:*—Since at common law, as it stood when the existing constitutional guarantees were framed, liability without fault was, at best, highly exceptional and was unknown as between master and servant,<sup>662</sup> and since "due process of law", or "the law of the land", may be held to require the determination of private rights in accordance with general principles of jurisprudence recognized at the time when these guarantees became operative,<sup>663</sup> it may colorably be argued that legislation which makes an employer answerable for injuries occasioned by no fault of his, or which mulcts one employer for injuries sustained in the service of another, amounts to a deprivation of property without "due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States and of similar provisions in the fundamental law of most of the States. Such was the reasoning of the New York Court of Appeals and such the argument advanced by learned counsel to every court which has had occasion to pass upon the new legislation.

To this argument three replies are made.<sup>664</sup> In the first place, liability without fault was not unknown to the eighteenth century common law.<sup>665</sup> English jurisprudence has, in fact, long recognized that one may stand in such initiatory relation to a chain of causation as to be rightly held answerable for consequences which were neither intended by him nor attributable to any negligence on his part.<sup>666</sup> The capitalist-employer's relation to work accidents is of this character: he initiates the whole industrial process and may justly be held to answer, in the first instance, for any injury to life or property thereby occasioned.<sup>667</sup> The absolute liability of an employer for injuries sustained in his service is thus supportable on the same

principles as the long established liability of a ship owner for sick and disabled seamen or the more ancient liability of a harbinger of fire or a keeper of cattle.<sup>668</sup> Hence the liabilities imposed by the new workmen's compensation acts are not subversive of "those ancient and fundamental principles of law" which are guaranteed by the due process clauses.

Secondly, the broad guarantees of the Bill of Rights are not to be construed with the same strictness as the more specific commands and prohibitions of written constitutions. Nor should they be interpreted with reference solely to the economic conditions and the corresponding social philosophy of the times in which they were framed.<sup>669</sup> These guarantees, in fact, were never intended to render the law unchangeable<sup>670</sup> or to deprive it of every quality but its age.<sup>671</sup> The law is, to a certain extent, a progressive science: changes in its structure have been made with increasing frequency from the signing of *Magna Charta* to the present day, and "it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes, as they arise."<sup>672</sup> In short, "there is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age."<sup>673</sup> Lastly, it is well settled that there can be no property, or vested interest in any rule of the common law<sup>674</sup> — such as the rule which imposes upon the employee, rather than the employer, the burden of occupational risks.<sup>675</sup> Hence, the due process guarantee does not preclude legislatures from so changing this rule as to conform to current standards of social justice.

Lastly, it is urged that legislation which would otherwise amount to a taking of property without due process of law may be justified as an exercise of the police power — the power of promoting the public welfare by restraining the use of liberty and property.<sup>676</sup> This power, in the language



of Mr. Justice Holmes, speaking for the Supreme Court of the United States, "extends to all the great public needs", and "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."<sup>677</sup> It is felt that the overwhelming sociological and economic arguments in favor of indemnifying work accidents on the principle of occupational risks are sufficient to bring legislation looking to this end within the police power, as above defined.<sup>678</sup> Indeed, it is scarcely too much to say that the compensation of work accidents is clearly within the police power in the narrower sense of a regulation in the interest of "the public health, peace, safety and morals".<sup>679</sup> It is the unanimous testimony, not only of the Germans themselves, but of foreign observers as well, that systematic accident indemnity in Germany has not merely diminished poverty — surely a legitimate end of police regulation — but has powerfully conduced to the saving of life and limb, has reduced the average duration of incapacity from work accidents, has improved the general health of industrial operatives, and has raised the efficiency of the nation at large. German publicists, employers, and trade unionists are nearly at one in attributing to their system of social insurance much of that marvelous industrial efficiency which has enabled them, with meagre natural resources, to outstrip more favored competitors in the contest for industrial supremacy.<sup>680</sup>

In support of the contention that compensation legislation is within the police power, are cited numerous statutes which impose liability without fault and which have none the less been upheld by courts of last resort.<sup>681</sup> Among such statutes may be mentioned those compelling the receiving carrier to pay for damage of merchandise caused by the negligence of a later carrier on the route,<sup>682</sup> making a railway company absolutely liable for fires started by its engines<sup>683</sup> and for

the death or injury of a passenger,<sup>684</sup> holding the owner of a building answerable for the sale of intoxicants upon his premises by a lessee,<sup>685</sup> obliging fire insurance agents to contribute to a fireman's relief fund,<sup>686</sup> taxing all dog owners to create a fund which is used to pay for sheep killed by dogs of unknown ownership,<sup>687</sup> and requiring banks to contribute to a fund for the guarantee of deposits.<sup>688</sup> Nearly all of these statutes are as open to the "due process" objection as any accident indemnity law yet enacted in the United States and none of them is supported by as urgent reasons of public necessity.

*Equal Protection of the Law:* — As has already appeared, most of the statutes under review are more or less restricted in scope, either because public opinion would not support such legislation if applied to all employments and all employees, or because it was thought necessary to limit the enactments to extra-hazardous occupations in order to bring them within the police power. Such limitations expose the statutes to the objection of being class legislation. That is, it is contended that these statutes violate the "equal protection" guarantees of the State and Federal constitutions in that they create new liabilities and remedies for some employers and employees while leaving the common law operative upon others.

Doubtless, a scholastic interpretation of "equal protection" would require the same law for minors and adults, for women and men, for coal miners and college professors. But, as actually construed by the courts, the guarantee of equality before the law does not prevent "reasonable classification". So long as the classes made by the legislature correspond to actual distinctions of substantial importance for the purpose in hand, and so long as like treatment is accorded to all persons under like conditions, the equal protection of the law is not denied.<sup>689</sup> There is little doubt,

therefore, that the legislature may prescribe rules of liability in extra-hazardous employments different from those applicable to other occupations.<sup>690</sup>

Accordingly it has been held that the exclusion of farm laborers and domestic servants<sup>691</sup> from a workmen's compensation act, or the limitation of such an act to specified dangerous employments,<sup>692</sup> or even to a particular industry, as coal mining<sup>693</sup> or railroad transportation,<sup>694</sup> is not violative of the principle of equality. Similarly, the repeal of common law defenses as an inducement to come under the compensation act, except as to establishments employing fewer than five persons, is not unreasonable discrimination.<sup>695</sup> The hazard of any regular employment is obviously less when there are but four co-employees than when there are more, and in any classification based on number or size the precise line of demarcation must be arbitrarily drawn.<sup>696</sup> Nor does the fact that an elective statute creates a different law for different persons in the same industrial situation constitute unequal justice within the meaning of the constitutional inhibition. Election under the act being (constructively) open to all, there is reasonable ground for the distinction between those who do and those who do not so elect.<sup>697</sup>

Of course, the classification to be upheld must rest on some reasonable ground and not be merely arbitrary.<sup>698</sup> Hence an occupation which is not extra-hazardous in fact can not be made so by mere legislative *fiat*, and a statutory declaration that certain enumerated employments are "hereby determined to be especially dangerous"<sup>699</sup> would not be conclusive on the courts as to any specific employment so enumerated.<sup>700</sup> So, too, the fact that an employment is extra-hazardous will not justify the creation of a double liability as to such employment only, whereby an employer therein who has been obliged to subscribe to a State insurance fund may still be mulcted in damages for mere ordinary negli-

gence.<sup>701</sup> It was on this ground that the Montana Coal Miners' Insurance Act, otherwise approved by the Supreme Court of that State,<sup>702</sup> was declared invalid. Doubtless, however, the legislature may, without repugnance to the equal protection clause, impose additional liabilities for wilful wrongs or for violation of the safety laws.<sup>703</sup>

*Jury Trial:* — Many of the workmen's compensation acts provide for the determination of claims thereunder without recourse to a jury and so involve an apparent impairment of the constitutional right to jury trial. None of the acts has thus far been declared invalid on this ground. The New York Court of Appeals was divided on the question <sup>704</sup> and, having found the act unconstitutional on other grounds, was not obliged to pass upon it. The highest courts of Massachusetts,<sup>705</sup> Montana,<sup>706</sup> Ohio,<sup>707</sup> and Washington <sup>708</sup> have resolved the question in favor of the statutory provisions in controversy. Inasmuch, however, as both the several provisions under consideration and the constitutional guarantees with respect to which they were called in question differ somewhat widely, it is difficult to make any general statement as to the course of reasoning followed. Still, two main lines of argument, favorable to the constitutionality of the provisions under discussion, are deducible from the adjudged cases.

The first of these arguments applies only to quasi-elective statutes. An elective act, it is said, involves no deprivation of constitutional rights since such act is operative only upon parties who have (constructively) assented thereto.<sup>709</sup>

With respect to a compulsory law, it has been argued that a clause reading, "the right of trial by jury shall remain inviolate",<sup>710</sup> applies only to causes of action wherein the right to a jury trial existed at the time of the adoption of the constitution. Actions in tort obviously fall within this category and doubtless the legislature could not provide for the



determination of a tort action otherwise than by jury trial, without the consent of the parties thereto. But the legislature may, in the exercise of its police power, abolish any common law cause of action not specifically protected by the constitution, and may substitute therefor a new remedy as to which no constitutional right of jury trial exists.<sup>711</sup>

The jury question can not be said to have been settled by the decisions thus far rendered. In none of the cases was the question presented by a party entitled to raise it. The Montana decision might have been reached without regard to this issue; the Massachusetts decision was an opinion of the Supreme Court of Judicature rendered to the Senate in advance of the enactment of the law; and the cases in the other States were friendly proceedings in equity.<sup>712</sup> In Ohio and Wisconsin the jury question, though argued by counsel, was hardly passed on by the courts; and in Washington the opinion announced must be regarded, in respect to this question, as mere *obiter dicta*, which binds no one, not even the justices who rendered it.<sup>713</sup> None the less, the opinions expressed probably indicate the position which these courts will take when the issue shall be presented by real parties in interest.

A collateral question, cognate to the one just discussed, is the power of an administrative officer or board to make awards under workmen's compensation acts. If the power vested in these boards is of a judicial character it is clearly in derogation of those constitutional provisions which vest all judicial power in courts of law and equity.<sup>714</sup> Five courts of last resort have thus far passed upon this question, and all are agreed that an administrative body may be empowered to determine issues of fact arising under such legislation, and that its findings as to matters properly within its jurisdiction may be made conclusive. Of course, some power of review must be preserved to the courts, as the determination of what matters are within the jurisdiction of such an ad-



ministrative body, the sufficiency of the facts found to support the award made, or the validity, as distinguished from the amount, of a claim under the act.<sup>715</sup>

Three conclusions may fairly, albeit tentatively, be drawn from the foregoing review of judicial decisions. In the first place, a quasi-elective act, based on the principle of occupational risks and imposing substantial penalties upon those employers and employees who reject the statute, is not a denial of "due process of law". Upon this point the highest courts of Massachusetts, Ohio, and Wisconsin have spoken with decisive voice; and there is no authority to be quoted against them. It seems clear, also, that litigious proceedings and jury trials under such legislation may, within wide limits, be swept away. Finally, a compulsory compensation or insurance act, in lieu of every other right and remedy, is, at least when restricted to hazardous employments, not beyond the police power of the State.

Greater doubt attaches to this last proposition than to either of the foregoing. The validity of such legislation has been upheld by the supreme courts of Montana and Washington, and denied by the New York Court of Appeals — notoriously one of the least progressive courts in the Union.<sup>716</sup> The acts of Massachusetts, Ohio, and Wisconsin being, at least nominally, elective, the decisions in those States are not directly in point. It is scarcely too much to say, however, that the three statutes last named, while voluntary in form, are compulsory in effect. A compulsory law gives the employer a Hobson's choice of accepting the statute or going out of business; these so-called elective acts give him the option of making affirmative election or losing his chief defenses in suits for damages.<sup>717</sup> It needs no gift of prophecy to forecast the verdict of a jury when proof of negligence proximately connected with the injury is the sole condition of recovery in an employer's liability action.

If the employer is not really free to elect under these so-

called "voluntary" acts, the workman is still less free. If the employer elects to take his chances with damage suits, the employee has not even a *pro forma* option. Nor is his option good for much if the employer brings himself within the statute, for affirmative election on the part of workmen may, and probably will, be made a condition of employment. In Ohio, the act is even avowedly compulsory upon the employee, his only alternative being to quit the service of an employer who subscribes to the State insurance fund. While, therefore, these acts were treated, by the courts which reviewed them, as affording free election, and were on this ground somewhat elaborately distinguished from the compulsory law of New York, it must be conceded that the distinction rests upon an insubstantial difference.

It was a matter of course that courts, concerned not to decide more than was necessary to uphold the validity of the acts before them, should have made much of the non-coercive character of these acts. Accordingly, the suggestion that the penalties upon negative election might work practical compulsion was treated as "mere speculation";<sup>718</sup> and it was intimated (truthfully enough) that to deprive workmen of their right to sue for damages under the unregenerate common law was to take from them nothing of substantial value.<sup>719</sup> Yet these same courts dwelt at great length upon the police power of the State as validating the legislation in question — a validation not needed by a genuinely voluntary act. In other words, the courts recognized that these acts do work deprivation of property to be justified only by reasons of public policy and necessity.

But if the police power will sanction any workmen's compensation legislation, surely it will sanction that which is best calculated to effect the purpose in view. That a compulsory law is more effective than a quasi-elective act is doubted by no one who has given serious attention to the subject. It is difficult to see, therefore, how a quasi-elective

statute can be brought within the police power by any line of reasoning that would not apply with added force to a frankly compulsory act.

Where the constitutional objections to a new departure in legislation are drawn from the broad guarantees of the Bill of Rights, the court's decision will greatly depend upon the weight allowed to the economic and sociological arguments in favor of the statute. There is reason to believe, therefore, that a compulsory law would be sustained by any court which would uphold such a statute as that of Ohio or Wisconsin. On the other hand, a tribunal like the New York Court of Appeals, which feels itself bound to prevent dangerous innovations,<sup>720</sup> would have little trouble in finding that the Wisconsin act is coercive in effect and that it, too, works a deprivation of property without due process of law.

Compulsory mutual or State insurance appears to hold a stronger constitutional position, in some respects at least, than compulsory compensation. Not only was a statute of the former type upheld and one of the latter kind overthrown, but the insurance plan seems really less open to attack as imposing individual liability without fault and it also is capable of being construed as an occupation tax upon industry, proportional to the hazards thereof, to compensate injuries arising out of occupational risks.<sup>721</sup> State insurance would likewise obviate the jury trial difficulty, at least as respects the determination of claims upon the State fund, since such claims are not causes of action.

#### ESTIMATE OF INDEMNITY LAWS

The indemnity legislation of this country is much too recent to be judged from its practical operation. Experience has revealed some of the weaknesses of the newly enacted laws, but in the main they must be appraised upon general principles and by analogy with similar legislation of Europe which has been put to the test of time. The four-

teen surviving statutes unquestionably constitute an immense advance upon the employers' liability systems which they partially supersede. It is no less clear that none of the acts yet passed approximates a definitive solution of the accident indemnity problem. In what follows emphasis will be laid upon shortcomings rather than excellencies, not in any spirit of carping criticism but with the hope of calling attention to mistakes which ought to be avoided in future legislation.

#### INADEQUACY

Even the most comprehensive and generous of American laws are narrower in scope and less liberal in the benefits provided than the corresponding legislation of European countries. Particularly unfortunate in this connection is the consistent failure to provide adequate medical care for the injured — a type of benefit which probably yields larger returns, in proportion to its cost, than any other form of accident relief. Still more inexcusable is the exclusion of non-resident alien dependents by the acts of Kansas, New Hampshire, New Jersey, and Washington.<sup>722</sup> There is no ethical or economic justification for such exclusion, and its practical effect, if any, is to impose a penalty upon the employment of American citizens.

#### ELECTION

The elective feature common to eleven of the fourteen existing statutes is open to three especially grave objections: it greatly lessens the remedial value of the legislation; it works unequal justice as between employees; and it imposes an undistributed burden upon employers.

The extent to which a quasi-elective law will prove operative is determined mainly by the pressure which it exerts upon the employer to accept its terms. In practice this reduces itself to the relative cost of insurance within and without the statute. *A priori*, therefore, it would be expected



that those acts which strip the employer of all common law defenses unless he accepts the compensation scheme will be much more effective than those which leave one or more of such defenses available under the like conditions. The mode of election, also, is of some importance: where affirmative rejection is required many employers will be brought within the law through sheer inertia. The employee's option, unless he is permitted to elect after injury, is of minor consequence. Few workmen would care to insist upon their common law remedies and any who might do so would doubtless be dismissed from the service. Lastly, the scale of benefits provided by the compensation scheme is an important consideration affecting the cost to employers who elect thereunder.

These deductions are fully substantiated by such experience as time has thus far afforded. The Wisconsin statute, it will be remembered, requires affirmative election, saves the most valuable of all defenses, that of contributory negligence, to employers who remain without the law, and provides a liberal scale of compensations. The result is strikingly shown by the very full records of the Industrial Commission. Of 5238 accidents reported during the first year as having caused disability for seven days or more, only 1332 or 25.4 per cent, fell within the compensation law.<sup>723</sup> The percentage is higher in the later months, being 33.7 for September, 1912; <sup>724</sup> but the great majority of work injuries remain, and probably will remain, unindemnified.

The California act is similar to that of Wisconsin except that it establishes the rule of comparative negligence for employers who remain under the common law. In that State 4800 accidents were reported between April 1 and October 1, 1912, whereof but 358 were within the compensation act.<sup>725</sup> Twelve months after the law went into effect only 36,000 workmen had been brought within its benefits.<sup>726</sup> In Illinois, where affirmative election is presumed unless the employer



serves notice to the contrary, it appears that the larger coal mine operators and probably a majority of building contractors have rejected the statute, whereas most manufacturers have acquiesced therein. No records exist to indicate what proportion of employees or of work injuries are subject to compensation.<sup>727</sup>

In Massachusetts the abrogation of contributory negligence and the relatively cheap insurance provided by the mutual association have sufficed to bring within the act 79 per cent of the employers who reported work accidents during July and August, 1912.<sup>728</sup> Five-sixths of the deaths incurred during the same months were compensated in accordance with the law.<sup>729</sup> In New Jersey, where election is presumed, the defense of contributory negligence abolished, and a rather low scale of compensations established, almost ninety per cent of the 2047 accidents reported between July 4, 1911, and February 10, 1912, were within the compensation act.<sup>730</sup> But this showing is probably more favorable than the facts would warrant. The New Jersey law, like that of Massachusetts, requires all injuries, no matter how slight, to be reported.<sup>731</sup> If 12,800 injuries occurred in Massachusetts in two months <sup>732</sup> more than 2000 must have occurred in New Jersey in seven months. What results would be revealed by complete records can only be a matter of conjecture.

The foregoing reports cover too short a period to afford a fair test of the quasi-elective plan. The number of workmen protected is likely to be small at first and to attain a maximum only after some years have elapsed. None the less, two facts stand out clearly from even this brief experience: (1) there is a rather close correlation between the remedial value of the statutes and the relative cost of compensation and liability insurance as shown by Table VII; and (2) even the most stringent quasi-elective act is far from attaining the effectiveness of a compulsory system.

Not more than three of the optional statutes protect one-half of the workmen in the industries to which they apply.

Unequal justice results from the inclusion of some and the exclusion of other workmen exposed to similar hazards in the same industry. Indemnity for accidental injury depends not upon a uniform law applying alike to all under like conditions, but upon the arbitrary choice of the employer. To illustrate, two structural iron workers in Milwaukee fall from "reasonably safe" runways and are killed. The dependents of the one receive \$3,000 because the contractor by whom he was employed had accepted the Compensation Act. The other's employer had chosen to remain under the common law; his family have no claim to compensation because his death was due to an "ordinary risk" of his employment. This objection to the quasi-elective plan was, for reasons already indicated, glossed over by the courts which have had occasion to pass upon it; but it is none the less a grave defect in any system of law which aims at equal justice.<sup>733</sup>

Lastly, by the quasi-elective plan producers in the same industry and the same competitive territory are subjected to different accident costs so that the burden of indemnity can not be distributed over the industry nor incorporated in the price of the product. Insofar, then, as the cost of compensation exceeds that of liability insurance the extra burden falls without recourse upon those employers who elect to compensate work injuries irrespective of negligence.

Against these assured disadvantages the quasi-elective plan can oppose only the debatable merit of being less open to attack on constitutional grounds. For the genuinely optional laws of Maryland and New York nothing can be said, except that they are perhaps preferable to no legislation.

#### INSURANCE

Perhaps the most disappointing feature of the legislation thus far enacted is the very general failure to provide effi-

cient and economical insurance of liability thereunder. Ten of the American statutes are, in this respect, modeled upon the British Workmen's Compensation Act, and eight, at least, have all the defects of the original. The Michigan and New Hampshire laws do, indeed, afford partial security to injured workmen; but they practically leave the employer to the tender mercies of the private liability companies. Even the so-called insurance, as distinguished from the compensation acts, are by no means so efficient as they could be made. The Massachusetts Association and the Ohio Liability Board are handicapped by the elections allowed in those States. The Washington act avoids this particular weakness, but possesses two grave defects of its own: (1) the risk classes and premium rates, being fixed in the statute, lack the flexibility so needful to meet the ever changing conditions of industry; and (2) each risk group is required to compensate all injuries occurring therein, a requirement which is equitable enough in a national system like that of Germany, but which in a single State amounts to self-insurance for some of the smaller industrial groups.

There result from these inadequate insurance provisions imperfect protection to workmen combined with needlessly high cost to employers, often amounting to a heavy penalty upon the acceptance of the compensation plan.

Not more than four of the fourteen acts provide adequate protection for injured workmen. The requirement of Michigan and New Hampshire that the employer make a showing of solvency is by no means equivalent to insurance. A business establishment which is entirely sound to-day may be bankrupt six months hence. Failure to insure is the more likely to occur because of the high premiums exacted under most of the compensation laws.

The heavy cost of the new laws is, in large part, attributable to the inherent wastefulness of competitive liability in-

surance. The stock companies have, to be sure, reduced agents' commissions in certain States, and their outlays for litigation should likewise decrease under the new system. But the experience of Great Britain, already adverted to, indicates that profits and expenses may be expected to absorb at least one-half of the premiums paid to such companies under any of the American statutes.

The effect of mutual or State insurance is apparent from Table VII. It will be observed that the Ohio State rates are but two-fifths of the stock company premiums for corresponding benefits and for the same employments in California and Wisconsin. Benefits under the Washington plan, being flat monthly pensions, are not directly comparable with those of other States, but, having regard to the general level of wages, are probably not lower, on the average, than those provided by the California act. The cost of these benefits is only three-fifths as much in the former State as in the latter, though the Washington rates yielded a heavy surplus during the first eight months' operation.<sup>734</sup> The Wausau Employers' Mutual of Wisconsin and the Massachusetts Indemnity Association likewise appear to have effected large

TABLE VII  
RELATIVE LEVEL OF INSURANCE RATES IN 56 EMPLOY-  
MENTS <sup>735</sup>

STATES	COMPENSATION INSURANCE	LIABILITY INSURANCE
California	100.	40.8
Illinois	74.2	91.2
Kansas	114.	64.4
Massachusetts (liability companies)	71.8	90.
Michigan	78.5	78.5
New Hampshire	60.	35.5
New Jersey	65.3	64.3
Ohio	44.	28.4
Washington	56.7	
Wisconsin	100.	45.9
Wausau Mutual (Wisconsin)	44.8	

savings to their members. In none of these cases has sufficient time elapsed to afford an adequate test of the several insurance systems but the brief American experience in this regard is fully corroborated by that of European countries and both substantiate theoretical conclusions as to the most economical mode of accident relief.

From a public point of view the gravest objection to private liability insurance, coupled with a quasi-elective act, is not the unnecessary burden thereby imposed upon employers, but the exclusion of workmen from the benefits contemplated by the legislature. Where insurance is notably higher within than without the compensation acts few employers are likely to accept the indemnity plan. Such is the case in California, Kansas, New Hampshire, Ohio, and Wisconsin. The same condition exists with respect to coal mines in Illinois and probably also as to most employments in Rhode Island. It is important to point out, in this connection, that relative rates are not governed solely by the respective provisions of the compensation and liability laws. Often the differences from one State to another are purely arbitrary. In Ohio, for example, the employer who does not subscribe to the State fund loses all common law defenses. Liability insurance in that State ought, therefore, to be as high as in Massachusetts and higher than in Illinois or California. The abnormally low liability rates made by stock companies in Ohio — less than one-third of the Illinois or Massachusetts rates — can only be explained by their desire to defeat the State insurance plan. In California, also, the stock companies have discriminated against the law in a seemingly arbitrary fashion. The liability law is the same in California as in Illinois; and the accident rate is, if anything, higher on the Pacific Coast than in the Mississippi Valley, yet the liability premiums in these two States are as 40 to 90. Similarly, there is no apparent economic justifica-



tion for the relative liability rates of Massachusetts, Michigan, and New Jersey.

The fact is that the liability companies have at stake nothing less than their future existence and prosperity. If the German or Norwegian examples should be generally followed in the United States, private liability insurance will be a thing of the past; whereas, if the English plan is adopted by a majority of the Commonwealths, the stock companies will flourish as never before. They are peculiarly tempted, therefore, so to adjust their premiums as to favor some and penalize other types of legislation. They can even afford to incur a temporary loss in certain States for the sake of influencing legislative action elsewhere — the more especially since losses suffered in Ohio may be recouped in Kansas or California. Such tactics appear to have been adopted in Ohio with the result that only 25,000 workmen in that populous industrial State were brought within the protection of the statute during the first ten months of its operation.<sup>736</sup>

Thus, it appears that nothing short of compulsory mutual or State insurance can in the long run be satisfactory to employers, to workmen, and to the general public. If compensation is compulsory and insurance optional, the burden imposed upon industry is disproportionate to the benefits received by accident victims. If election is allowed, even though economical insurance is provided by the State or by a mutual association, the liability companies may attempt to defeat the legislative intent by so arranging their rates as to induce employers to reject the compensation plan. If both compensation and insurance are optional, each of these evils is likely to result. It is significant in this connection that the Industrial Accident Board of California, the Industrial Commission of Wisconsin, and the Ohio Liability Board have alike found the existing laws of those States inadequate to afford the relief proposed by the legislatures.<sup>737</sup>

## ACCIDENT PREVENTION

The great requisites of accident prevention are scientific knowledge of the causes of accidents and of the means of preventing them, adequate incentive to employ every known preventive, and efficient administration of the safety laws and regulations. None of the American States has thus far met all three requirements. Massachusetts alone is compiling accident records adequate to the purpose. Only Wisconsin provides thorough administration of the safety statutes. Washington is equally unique in enlisting the self-interest of employers on the side of safety. Private liability insurance has never been very effective in this respect. True, the liability companies have rendered good service in diffusing information as to accident prevention, and they also impose nominal penalties in the way of higher premiums for neglect of safety requirements. But the prevalence of rebating has hitherto prevented the enforcement of these penalties. Liability insurance is at present in the "gentlemen's agreement" stage of pre-monopolistic combination and exhibits many of the practices familiar to students of railway history. Published tariffs are freely departed from in the scramble for new business and large employers obtain so many concessions that insurance rates for similar risks in the same State vary as much as sixty-five per cent.<sup>738</sup> Under such conditions rigorous insistence upon safety measures is out of the question. The Massachusetts association and the Liability Board of Ohio are equally helpless: the employer who is penalized by either will seek refuge with a more lenient stock company. The Ohio board apparently has further impaired its effectiveness by basing its differential premiums upon the actual experience of particular establishments.<sup>739</sup> Obviously a factory may run for years with no serious accident and then have a dozen operatives killed by a single boiler explosion. The only just or adequate basis of differential rates is the degree of compliance

with definite standards of safety established by broad statistical experience.

#### ADMINISTRATION

Only six States have created appropriate machinery for the administration of their compensation laws. In view both of European experience and of the fact that ordinary courts are not equipped to cope with difficult administrative problems, the failure of eight States to establish permanent Industrial Accident Boards can only be regarded as an unfortunate concession to the prevalent American prejudice against efficient government. Where compensation is administered by courts of law and insurance is affected through stock companies the "ambulance chaser" and the claim adjuster will continue to flourish and unconscionable bargains will continue to be made at the expense of accident victims. When it is added that in most of the States which have adopted quasi-elective acts the common law still applies to a majority of work injuries, it will be seen that the new indemnity legislation goes but a short way toward remedying the evils it was designed to remove.

In justice to the legislatures and to the commissions whose work is under review it should be said that many of the patent shortcomings of the existing laws are due to the very novelty of the principles adopted, to the want of adequate data upon which to proceed, to inexperience in dealing with like problems, and to the lack of an intelligent public opinion upon the subject. The work of the commissions, especially, was as much educational as investigative. The demand for a rational indemnity system had to be consolidated, and in good part created, in order that the laws proposed and enacted should have a broad basis of popular support. For analogous reasons most European nations began, more than a quarter of a century ago, with very in-

adequate legislation and have extended the scope and increased the efficiency of their indemnity systems by successive amendments. A similar course will doubtless be followed in the United States. The student may regret that the people of this country should profit so little from the rich experience of Europe, but the method of trial and error seems to be the approved American legislative practice.

Some of the gravest defects in the newly enacted legislation are attributable to that peculiar interpretation of constitutional law which has so often perverted Magna Charta and the Bill of Rights into barriers to social progress.<sup>740</sup> In certain States this obstacle may have to be overcome by the clumsy and inadequate method of constitutional amendment. Fortunately, however, an increasing number of the higher courts already exhibit a pronounced tendency to construe the historic charters of liberty in the light of twentieth century needs and ideals. Indeed, in view of the decisions actually rendered on the question in hand, it may be doubted whether many of the legislatures were not too timid in the face of constitutional objections, and whether more adequate indemnity laws would not equally have been sustained.<sup>741</sup>

## VII

### THE IOWA EMPLOYERS' LIABILITY COMMISSION

Employers' liability reform is no new thing in Iowa.<sup>742</sup> The railway fellow-servant statute dates from 1862 and has repeatedly been amended in the direction of greater liberality to employees. The doctrine of assumption of risk was modified as to all employments in 1907 and was well-nigh abrogated in 1909. The last mentioned year witnessed also the establishment of the rule of proportional negligence for certain classes, at least, of railway employees. The net result of all this legislation is satisfactory to neither employers nor employees. The indemnity of work accidents still depends upon the application of the law of negligence, and that law, in Iowa as everywhere else, is inadequate, slow, haphazard and extremely wasteful in operation. The demand for a rational indemnity system has, accordingly, waxed strong in recent years and has been quickened by the legislation of other States already recounted. Bills looking to the enactment of a quasi-elective compensation law were introduced in the Thirty-fourth General Assembly<sup>743</sup> and were strongly supported by the Iowa Federation of Labor. The Manufacturers' Association, while favoring the principle of compensation, opposed these particular bills as ill-digested, and a compromise was at length effected<sup>744</sup> which resulted in the creation of an Employers' Liability and Workmen's Compensation Commission.<sup>745</sup>

As members of this Commission the Governor appointed Senator John T. Clarkson, who became chairman, Mr. W. W. Baldwin of the Burlington Railway, Judge John L. Stevens of Boone, who represented the Manufacturers' Association,



Mr. P. S. Billings, representing the railway trainmen, and Mr. John O. Staly, a coal miner though not an official representative of the United Mine Workers. Mr. Welker Given of Des Moines was chosen secretary.

The Commission, having before it the results obtained by similar bodies in other States, and having very limited time and funds at its disposal, devoted far less attention to the investigation of existing evils than to the consideration of the remedies it was created to devise. The original investigation comprised: (1) collation of employers' accident records; (2) a study of employers' liability insurance in Iowa; (3) an analysis of indemnity laws in this country and abroad; (4) an inquiry into the actual working of recent indemnity legislation in the United States; and (5) ten public hearings for the taking of testimony from employers, employees, and other interested persons.<sup>746</sup>

Accident records for the years 1909, 1910, and 1911 were secured from 300 Iowa manufacturers employing 18,416 workmen. The number of injuries reported was 2304, whereof 16 were fatal, 2 caused total disability for life, and 63 entailed permanent impairment of earning capacity. There were 2214 cases of temporary disability involving an aggregate wage loss of \$50,738. Of the 300 manufacturers, who reported, 230, employing 15,589 workmen, carried liability insurance at a cost of more than \$100,000. The total expense incurred by these employers on account of work accidents during the three years amounted to \$178,725.

The growth, extent, and working of employers' liability insurance in Iowa was investigated from the published reports of the Auditor of State. It appeared that the amount of premiums paid for such insurance in this State, increased from \$56,471 in 1902 to \$280,577 in 1911. The aggregate of premiums collected during the ten year period was \$1,592,770, whereof \$814,037 was paid for settlements and adjustment of claims — a decidedly higher proportion than in the

United States at large. How much of this amount was actually received by injured workmen or their dependents can not be told from the data at hand. Assuming that court costs, contingent attorneys' fees, adjusters' salaries and other deductions are much the same in Iowa as in other States, the amount which reached the ultimate beneficiaries can not have greatly exceeded one-third of the sum paid out in insurance premiums.<sup>747</sup>

Analyses of the leading indemnity acts of the United States and brief summaries of certain European laws were prepared by Chairman Clarkson. The Commission thus had before it many types of accident relief from which to obtain suggestions for its own recommendations.

Secretary Given visited New Jersey, Ohio, and Illinois, and reported upon the practical operation of the recent acts of those States. Chairman Clarkson also made personal investigations in Massachusetts, New York, Wisconsin, and other States. Members of the Commission attended the Chicago conference of similar bodies in October, 1911. Chairman Pratt of the Washington Industrial Insurance Commission attended the first public hearing at Des Moines and explained the working of the Washington plan. Launce- lot Packer of Massachusetts, Secretary of the Federal Commission, and P. Tecumseh Sherman of New York likewise appeared in person before the Iowa Commission. The Commission also obtained opinions from many experts within and without the State and a constitutional brief from Judge Nathaniel French of Davenport.<sup>748</sup>

Public hearings were held during the month of March, 1912, at Des Moines, Council Bluffs, Sioux City, Fort Dodge, Waterloo, Dubuque, Cedar Rapids, Davenport, Burlington, and Ottumwa.<sup>749</sup> The amount of new facts thus elicited was probably not great, but the hearings provided a valuable test of public opinion and served also to stimulate interest in the proposed legislation. When the Commission began

its work relatively few even of those immediately concerned in the problem had given much thought to the question of accident relief. It was necessary to evoke inquiry and focus opinion in order that the Commission's recommendations might have a broad basis of popular approval. Widely varying views were expressed by those who attended the hearings, but it is interesting to note that few employers, and fewer workmen, were opposed to the principle of compensation irrespective of fault.

The chief task before the Commission was, of course, the framing of a legislative measure which should provide reasonably adequate relief to workmen without unduly burdening employers and which should prove acceptable to the chief parties in interest. In pursuance of this task the Commission examined the leading indemnity systems both of the United States and of foreign countries, and exercised a most catholic election in selecting proposals for endorsement. The merits of its recommendations may be judged from the ensuing summary. Discussion is deferred to the concluding chapter.

#### THE COMMISSION'S BILL 750

The bill endorsed by a majority (four members) of the Commission may be characterized as providing a quasi-elective mutual insurance system, more nearly resembling the Massachusetts plan than any other yet adopted in this country. The closest European analogy is afforded by the compulsory laws of Luxemburg and Switzerland.

#### BASIS OF INDEMNITY

The Commission's bill contemplates indemnity irrespective of fault, except as to injuries sustained while the injured person was intoxicated or caused by "the employee's wilful intention to injure himself or to wilfully injure another" (Section 2).

## SCOPE OF INDEMNITY

The proposed act applies to all employments (Section 1 *a*); to the State and its subdivisions (Section 1 *b*), and to all private employers who employ five or more workmen in the same common enterprise (Section 1*a*); to all employees except those engaged in a clerical or official capacity and casuals not employed for the purpose of trade or business (Section 17 *b*); and to all personal injuries arising out of and in the course of the employment (Section 1). All employees engaged "in the execution of the work, whether under the first or any one of sub-contractors shall be regarded as engaged in one joint enterprise or business" (Section 7 *c*).

## ELECTION

The proposed act is compulsory upon public bodies and their employees. Every private employer within the terms of the compensation plan is presumed to have accepted the same unless he makes affirmative rejection by serving notice upon his employees and upon the Industrial Commission of Iowa (Section 1). The employee's acceptance is likewise presumed in the absence of similar affirmative rejection (Section 3). If the employer rejects the act, he loses the defenses of fellow-servant, assumption of risk, and contributory negligence, and has the burden of proof to show that any injury sustained in his service was not proximately caused by his negligence (Section 1); whereas the existing common law defenses are saved to employers who accept the act (Section 3 *b*). The compensations provided are exclusive of other rights and remedies as between employers and employees who do not reject the act (Section 3 *a*), but the Employers' Indemnity Association has a right of action to recover compensations paid on account of injuries caused by the employer's violation of the safety statutes (Section 21).

## SCHEDULES OF COMPENSATION

The employer, upon the request of the injured workman, or upon the order of a court, or of the Industrial Commission, is required to furnish "reasonable surgical, medical and hospital services and supplies, for four weeks after the injury, to an amount not exceeding \$100" (Section 10 *b*).

The expenses of last sickness and burial, to the amount of \$100 are to be paid by the employer in all cases of injury resulting in death. If the employee leaves no dependents this is the only compensation unless the fatal injury was caused by the employer's failure to comply with legal safety requirements, in which case full death benefits must be paid to the Indemnity Association (Section 10 *c*).

A weekly pension, equal to sixty per cent of the deceased's wages, but not less than \$5 nor more than \$12 per week, for three hundred weeks, is granted to persons wholly dependent upon a workman who dies as the result of a work injury (Section 10 *d*). Pensions to partial dependents are proportional to the support received from the deceased (Section 10 *e*). A surviving spouse, unless the survivor had wilfully deserted the deceased, a child or children under sixteen, and the parent of a minor if entitled to the wages of the deceased, are conclusively presumed to be wholly dependent. Other cases of dependency are to be determined in accordance with the facts existing at the time of the injury (Section 17 *c*).

Temporary disability benefits are sixty per cent of wages, but not more than \$12 nor less than \$5 per week for 300 weeks. Total permanent disability benefits are the same amount for 400 weeks; but if incapacity continues after the expiration of that period, a life pension is granted of not less than \$10 nor more than \$25 per month (Section 10 *h* and *i*).

Fixed percentages of wages, subject to the same maximum and minimum as above, are paid for certain enumerated



bodily injuries causing permanent impairment of earning capacity (Section 10 *k*).

No compensation is paid for the first two weeks incapacity, nor for any injury which does not produce disability for at least two weeks (Section 10 *g*).

Compensations due under the act are a preferred lien upon all the property of the employer and are exempt from attachment, levy, execution, garnishment, or satisfaction of debts (Section 20). Pensions are commutable into lump sums only with the consent of the Industrial Commission or of the District Court of the county wherein the injury occurred (Section 15). There is the usual provision for medical examination of invalid pensioners upon the request of the employer concerned (Section 12).

#### BURDEN OF INDEMNITY

The whole burden of indemnity payments is placed upon the employer, and it is expressly provided that compensations due under the act "shall not be in any way reduced by contribution from employees" (Section 13).

#### CONTRACTING OUT

Contracting out of liability under the proposed act is not permitted upon any terms whatever, and "no employee or beneficiary shall have power to waive any of the provisions of this Act in regard to the amount of compensation" payable thereunder. Withholding any part of an employee's wages to provide insurance against liability under the compensation plan is made a finable offense (Section 18). Any contract or settlement between an employer or his representative and a beneficiary made within twelve days after an injury is presumed to be fraudulent (Section 19).

#### INSURANCE

Every private employer of five or more workmen in the same general employment who does not expressly reject the

compensation plan thereby becomes a member of the Employers' Indemnity Association, an unincorporated body, which assumes for its members all liability under the Compensation Act. The Association is to be governed by a board of ten directors, appointed in the first instance by the Governor and thereafter elected by the general meeting. Each member has one vote in the general meeting, and one additional vote for each five hundred employees subject to the act; but no member may cast, in his own right or by proxy, more than twenty votes. The board of directors, subject to the approval of the Industrial Commission, are authorized to distribute the members into risk groups, to fix premium rates for each group and make rules for the prevention of injuries. Ten per cent of the premiums collected must be placed in a reserve fund until the sum of \$1,000,000 is accumulated. Until the reserve reaches \$100,000 the risks must be reinsured in one or more liability companies approved by the Industrial Commission (Part III).

#### ADMINISTRATION

The bill creates an Industrial Commission of three members to be appointed for ten years by the Governor and Senate from a list of fifteen nominees to be submitted by the Supreme Court (Section 24). All recommendations for appointment must be in writing, signed by the person making the recommendation, and filed for public inspection (Section 41). No member of the Industrial Commission may serve on any political party committee, or "espouse the election or appointment of any person for political office", or contribute to the campaign fund of any party or candidate, and no candidate for appointment may make any promises in return for the support of his candidacy (Sections 39, 40). The Commission is authorized to make rules for carrying out the provisions of the compensation act, to subpoena witnesses, administer oaths, and examine books and

records pertaining to cases before it. It has general supervisory powers over the Indemnity Association, and discharges important functions in the adjudication of claims.

#### ADJUDICATION OF CLAIMS

The Commission's recommendations under this head may most conveniently be stated as a series of propositions.

If the employer and a beneficiary reach an agreement as to the compensation due under the act, a memorandum thereof must be submitted to the Industrial Commission and if approved by it becomes enforceable for all purposes. But no agreement may be approved unless in accordance with the terms of the act (Section 27).

In the event of failure to reach an agreement, the dispute shall be referred to an Arbitration Committee of three persons with a member of the Commission as chairman. The Arbitration Committee, aided by a physician when necessary, shall investigate the claim and make an award which, unless appealed from within five days, is binding upon the parties. The arbitrators' fees are divided equally between the employer and the claimant. All other costs, including a fee of not more than \$50 for the claimant's attorney, shall be taxed to the losing party (Sections 28-33).

Upon the demand of either party, if made within five days, the Industrial Commission shall review the decision of the Arbitration Committee and may revise the same in whole or in part or refer the matter back to the Committee for further findings of fact (Section 34).

Any party in interest may present certified copies of an order or decision of the Industrial Commission, or of the award of an Arbitration Committee, from which no appeal has been taken within five days of its rendition, or of an agreement to the District Court of the county wherein the injury occurred, whereupon said court shall enter a decree

in accordance therewith as if the matter had been heard and determined in said court (Section 35).

There shall be no appeal from any decree entered as above upon any question of fact, nor from any decree based upon the award of an Arbitration Committee or a memorandum of agreement (Section 35).

Fees of attorneys and physicians for services under the Act are subject to the approval of the Industrial Commission (Section 37).

#### MINORITY REPORT

Mr. W. W. Baldwin, being unable to accept the insurance plan or the administrative machinery proposed by a majority of the Iowa Commission, submitted a separate bill. Mr. Baldwin's draft looks to a compulsory compensation act, limited to employers of five or more persons, and administered by the ordinary courts. Liability is placed directly upon the employer, and insurance is permissive only. Contracting out is allowed if the employer provides a relief scheme certified by the Auditor of State as not less favorable to the workmen than the compensation act. Indemnity for total disability begins on the fifteenth day after the injury and is fifty per cent of average wages, but not less than \$5 nor more than \$10, for a period of not more than four hundred weeks. Fixed compensations are provided for certain dismemberments. Death benefits vary with the number of dependents and the degree of dependency, but can not exceed fifty per cent of the average earnings of the deceased for three hundred weeks nor a total of \$3,000. Dependents not resident in the United States or Canada are excluded except that a non-resident widow may receive not more than 312 days' wages of the deceased. A funeral benefit of \$100 is payable only where there are no dependents. A peculiar feature, not likely to find favor with wage-workers, is the provision for county medical relief.

Certain omissions in Mr. Baldwin's bill are noteworthy. While wilful negligence, intoxication, or removal of a safety device by the injured employee is a bar to recovery, no additional liability is imposed for the employer's wilful wrong or for his violation of the safety laws. There is no provision for the non-litigious determination of claims, except by voluntary agreements between employers and claimants, nor is there any administrative or judicial control of such agreements adequate to prevent unfair or oppressive settlements. There is, however, provision for the summary hearing, without jury trial, of compensation controversies; and the findings of the district court are reviewable only on questions of law. The fees of claimants' attorneys are subject, as in most compensation acts, to the approval of the trial judge. A unique provision requires the County Attorney, without charge, to represent claimants in all court proceedings. Claims to compensation enjoy no preference over other debts of the employer nor are compensations due or paid exempted from assignment or seizure.



## VIII

### SOME STANDARDS OF INDEMNITY LEGISLATION

Both the principle upon which the indemnity of work accidents should be based, and the most efficient mode of giving effect thereto, may be said to have been settled by the experience of Europe and America and by the researches of many students. The most important *desiderata* have been suggested in the foregoing pages; but a restatement of the main points will at once serve to summarize the results of the present inquiry and incidentally afford a standard for comparison with the recommendations of the Employers' Liability Commission. The legislator, of course, is bound to consider not only what is desirable but what is expedient in view of constitutional limitations and of the current state of public opinion. None the less, it is highly desirable to adopt correct principles at the outset. Details can readily be filled in or modified as experience may suggest, but an entire change of system can only be effected with much loss, delay, and inconvenience. Accordingly, an attempt will be made in what follows to define the standards to which the indemnity of work injuries should approximate, to point out the limitations which prevent the present realization of these standards in Iowa, and to indicate certain features which appear suitable for immediate adoption here.

#### PRINCIPLE OF INDEMNITY

In the first place, there can be no reasonable doubt that the principle of occupational risks should form the basis of accident indemnity. This principle has been endorsed by both organized labor and organized capital; by the American

Federation of Labor and the National Association of Manufacturers, by the railway brotherhoods, by the Steel Corporation, and by the International Harvester Company.<sup>751</sup> It forms the basis of the indemnity legislation of twenty-six foreign governments,<sup>752</sup> and of sixteen of the United States, and has been recommended for adoption by every investigative commission that has thus far reported in this country. So generally, indeed, has this principle been approved by students of political science, sociologists, jurists, and statesmen that, in the language of the Supreme Court of Washington, "to assert to the contrary is to turn the face against the enlightened opinion of mankind".<sup>753</sup>

#### PLAN OF INDEMNITY

There is just as little question, in the second place, that the principle of occupational risks can be given full effect only through universal, compulsory insurance, conducted either by the State or by a mutual employers' association under State supervision. No system which imposes liability upon the individual employer can distribute the cost of accident indemnity over the whole industry and place the ultimate burden where it concededly belongs — upon the consumers of the products. No insurance in competing stock companies can be economical in operation or can eliminate unconscionable settlements and hard bargains or can be efficient in the all-important matter of preventing accidents. Such is the conclusion of Messrs. Schwedtmann and Emery who made an elaborate investigation of European compensation systems on behalf of the National Association of Manufacturers,<sup>754</sup> of Lee K. Frankel and Miles M. Dawson who made a similar study under the auspices of the Russell Sage Foundation,<sup>755</sup> and even of those employers' liability commissions who, on grounds of constitutionality, thought fit to recommend a different system.<sup>756</sup> Such, too, is the unanimous testimony, not only of the great German authori-

ties,<sup>757</sup> but of French and English students as well.<sup>758</sup> France, after twelve years' experience with a liability system of the British type, adopted, in 1910, a law based on the German model. It is notorious that the British people are dissatisfied with the working of their compensation law.<sup>759</sup> To reject the plan of compulsory mutual or State insurance is, therefore, deliberately to adopt a system of proven inferiority.

#### COMPULSION OR ELECTION

Compensation should be compulsory in order that all workmen intended to be included shall be brought within the protection of the proposed legislation. The shortcomings of the quasi-elective plan have already been pointed out in some detail. Unless the scale of compensation is relatively low, and the liability of employers who reject the compensation plan extremely rigorous — unless, in other words, insurance is cheaper within than without the act — relief will be provided, as in California and Wisconsin, for but a minority of work accidents. And if State or mutual insurance is attempted, the liability companies, for reasons already explained, may induce employers to reject the plan by insuring them at a loss until such time as the act is repealed or modified. The Ohio plan has failed at this point and a similar weakness seems to inhere in the scheme proposed by the Iowa Commission. It is extremely doubtful whether adequate indemnity and economical insurance can be secured by anything short of outright compulsion.

At best, therefore, the quasi-elective plan is a makeshift, to be justified, if at all, only by the fear that the courts will overthrow a compulsory act. It is on this ground alone that any legislature has enacted, or any commission recommended, a quasi-elective law. With respect to the grave constitutional difficulties, expert opinion is divided. The New York precedent did not deter Arizona from adopting, nor the Federal Commission from proposing, a compulsory

plan. Many able constitutional lawyers are committed to the view that compulsory compensation is not a denial of due process of law.<sup>760</sup> There is, perhaps, even stronger ground, in view of the Washington and Montana decisions, for believing that a compulsory insurance act would be sustained. On the other hand, the quasi-elective plan might be successfully attacked, before an unfriendly court, as establishing unequal justice. Logically, indeed, the semi-compulsory acts which have been upheld are as open to the due process objection as the New York statute which was overthrown.

The very reasoning of the New York Court of Appeals may be applied with scarce a change of phraseology to the vital feature of the quasi-elective plan — the conditional abrogation of the common law defenses. When the Constitution of Iowa was adopted it was the law of the land that the master is not answerable to one servant for the fault of another, that no person can recover for an injury to which his own want of care in any degree contributed, and that the plaintiff has the burden of proof to show that his injury was approximately caused by the defendant's negligence. If these rules of law can be swept away by legislative fiat, as is proposed in the Commission's bill, why not also that other rule of no liability without fault? All alike are judge-made law, all are comparatively recent innovations upon the primitive rule of absolute liability and all embody the economic beliefs, and reflect the economic conditions, of a by-gone age. If any of these principles is indispensable to due process of law, the others should be equally unchangeable.

The New York decision was pronounced by an ultra-conservative court at a time when modern indemnity legislation was a new thing in the United States. The precedent thus established has not been followed elsewhere: it was expressly refuted by the Supreme Court of Washington,<sup>761</sup> and seems to be out of line with repeated decisions of the United States Supreme Court upon the requirements of due process

—decisions which, by the way, were treated with scant courtesy by the New York Court of Appeals.<sup>762</sup> The Supreme Court of Iowa is far from reactionary, and sound principles of accident relief are no longer novel to the bench and bar. It would seem unnecessary, therefore, to forego the very great advantages of compulsion on the chance that an obligatory act would be invalidated by any court which would be likely to sustain so stringent a statute as that proposed by the Iowa Commission.

If, on constitutional grounds, the quasi-elective plan is to be adopted, the Iowa Commission's proposals are all that could be desired. Three of the recommendations made deserve particular comment. (1) The presumption that both employers and employees have accepted the act unless they affirmatively reject it enlists inertia on behalf of the law. It is much more effective for the purpose in view than the requirement of affirmative election. (2) The doctrine of contributory negligence is the most important defense of the ordinary employer in liability actions, being fatal to recovery in about two-fifths of all personal injury cases. Its conditional abrogation, as proposed by the Iowa Commission, is vital to the success of a quasi-elective plan. (3) The reversal of the burden of proof in employers' liability cases appears to be original with the Iowa Commission. Every one who is familiar with this class of litigation knows the difficulty which plaintiffs experience in obtaining testimony and the number of cases that are taken from the jury for want of *prima facie* proof. Placing the burden upon the employer will greatly facilitate recovery. The constitutionality of these provisions was conceded even by the New York Court of Appeals<sup>763</sup> and appears to be beyond successful attack.

It would hardly be possible to go further than the Commission has gone in modifying the common law without im-



posing liability regardless of fault. *A priori*, it might be supposed that no employer would care to take his chances with the law as thus modified, and that practical compulsion has been effected under the form of free election. Such, probably, will be the result unless stock companies should decide to carry even this extraordinary liability at low rates in order to defeat the Commission's insurance plan.

#### EXCLUSION OF OTHER REMEDIES

The compensations provided ought to be exclusive of every other remedy as against employers within the act. Any other course would expose a compulsory statute to attack as imposing an unreasonable double liability.<sup>764</sup> Even under an elective plan, the employer who has paid his quota into a common fund should not, in fairness, be subjected to damage suits for mere negligence. Accordingly, the Iowa Commission has proposed that the act shall be exclusive of other remedies as between employers and workmen who fail to reject its terms. Employees who do reject the plan can not, of course, be barred from their right of action. It can and should be provided, however, that the Indemnity Association shall defend all such suits against its members. The form of policy prescribed in the Commission's bill (Section 55) probably covers this liability, but the language might, perhaps, be made more explicit. If State insurance is to be adopted, a similar provision should be incorporated.

What has been said as to exemption from liability for ordinary negligence does not apply to the employers' violations of safety laws. The State fund or the Indemnity Association should have the right to recover compensations paid on account of injuries caused by such violations.

#### INSURANCE

The advantages of compulsory and exclusive State or mutual insurance have repeatedly been emphasized in these

pages, but the point is so important that some further space may properly be devoted to its consideration.

Compulsory insurance makes it certain that compensation will be paid when due, and enables payments to be made with safety in the form of pensions rather than in lump sums. The requirement that the employer who does not insure shall make a showing of solvency to some administrative board (the Michigan and New Hampshire plan) is but a partially effective substitute. Nothing short of an indemnity bond would provide adequate security — and such a bond would be a clumsy and expensive mode of insurance.

If insurance is to be required some economical and efficient substitute for the stock companies must be provided. Commercial liability insurance is too wasteful to be tolerated. In Great Britain, with individual liability and stock company insurance, the expenses of administration, litigation, and the settlement of claims, advertising, agents' commissions and underwriters' profits, absorb nearly fifty per cent of the liability premiums, or add one hundred per cent to the cost of accident indemnity. In Germany, with compulsory mutual insurance, similar expenses absorb but fourteen per cent of the premiums, or add only seventeen per cent to the cost of indemnity. In Norway, under compulsory State insurance, the proportions are twelve per cent and fourteen per cent respectively. In other words, benefits which in Great Britain cost the employer \$3.72 per \$100 of pay-roll, cost \$2.16 in Norway and \$2.24 in Germany.<sup>765</sup>

Either the Iowa Employers' Indemnity Association or a State insurance department should be able to approximate the records of the German mutuals in point of economy, particularly if the State should assume, as it ought in fairness to do, the administrative expenses. Under the plan here contemplated, business would come to the Association or department automatically. It would need no advertising and would have no agents' commissions to pay nor profits

to provide. Its outlays for litigation should be small and it would require very few adjusters instead of the large number necessary under the competitive system. Lastly, if membership were compulsory, the Association could safely adopt the assessment plan, with only a moderate reserve to provide for contingencies. Probably a sum equal to the average yearly expenditures for compensations would be sufficient.

The current assessment plan, as was explained in discussing the German system, withdraws the minimum of capital from business enterprise and starts out with a low cost which is only gradually increased, thus throwing the least possible strain upon industry. The full reserve system, on the contrary, imposes the maximum charge at the outset and ties up a vast capital in low return securities. The argument that full reserves are essential to safety, though true enough of stock companies or voluntary associations, has no application to a compulsory State or mutual fund — which always has the power to increase assessments as the need arises. It may be added that data for the computation of premiums upon the capitalized liability plan are not now, and will not for many years be, available. No State as yet has accident records adequate to the purpose. The liability companies are not much better off. Their former rates depended, not so much upon the income loss of accident victims, as upon the state of the law and the attitude of courts in particular jurisdictions. When called upon to frame a tariff of premiums on the new basis they had to proceed largely by guess. By the current assessment plan premiums, after the first year, would be based on actual experience and could never be either greatly excessive or grossly deficient. But this plan is feasible only for a compulsory mutual or State fund.

What is even more important, from a social standpoint, a State department or a mutual association, membership in

which is obligatory, can take effective measures for accident prevention and can impose adequate penalties upon those who disregard safety requirements. Commercial liability companies, as was pointed out in another connection, are necessarily much less effectual for the saving of life and limb.

Lastly, a self-contained, compulsory insurance system, like that of Germany or Norway, distributes the cost of accident relief as a fixed charge over the whole industry and passes it on in the price of products to the consumer. Such a result obviously can not be attained within the limits of a single State. The products of Iowa's shops and mines must compete with those of other States, and a tax upon these wares can not be entirely shifted to the purchasers thereof. Yet a uniform insurance system, even if confined to Iowa, will effect a much more even distribution of the burden than can be secured by any other plan. Building contractors, and some other classes of employers, will be able to tax the whole indemnity charge to their patrons. Even manufacturers will treat their insurance premiums as fixed operating costs and will recover a considerable part of them from the consumers of their products.

The foregoing advantages can not be attained in anything like full measure if a choice of insurers is permitted. Insurance is emphatically a "business of increasing returns", in that the proportion of general or "overhead" expenses bears an inverse ratio to the volume of transactions. Insofar, then, as competition limits the membership of the State department or association the cost of insurance will be enhanced. In addition the department or association will be compelled to indulge in many of the wastes of competition — duplication of agencies and adjusters, advertising, and perhaps commissions. Both sources of loss will be augmented by the efforts of stock companies, through specially devised, limited liability policies, to secure the preference



risks and throw the undesirable applicants upon the mutual or State fund. The effects of such competition have been felt in both Massachusetts and Ohio,<sup>766</sup> and are likely to appear in an aggravated form under the Michigan plan which seems specially designed to secure a monopoly of bad risks for the State Insurance Department. A further drawback is the necessity of large reserves under any optional system. Current expenditures upon the assessment plan will inevitably increase with the lapse of time, and when attempts are made to raise the assessments correspondingly, subscribers will desert the fund. Neither the Massachusetts Association nor the Wisconsin mutual appears fairly to have faced this problem. Competition is even more fatal to accident prevention than to economy. This point was sufficiently emphasized in estimating the demerits of the Massachusetts and Ohio laws and need not be further considered here. Lastly, the co-existence of no insurance and of two or more insurance systems makes impossible any attempt at distributing the burden of accident indemnity.

Compulsory insurance in a State department or a mutual association appears, therefore, to be the plan best calculated to secure the great ends of accident indemnity legislation.

As between mutual and State insurance, the balance of advantages probably lies with the former. The great objection to the State plan, in Iowa at least, is the menace of political manipulation. If authority to classify employments and fix premiums in accordance with risks is vested in an administrative board, the administrators have a dangerous power of coercion and favoritism. If classes and rates are prescribed by the statute, the system is too inflexible to meet the requirements of the case. A mutual association not only avoids this particular objection: it should be more acceptable to employers and more heartily supported by them. It is probable, too, that such an association, particularly if divided into semi-autonomous industrial groups,



would be more effective for accident prevention. Employers are necessarily in close touch with the conditions which produce work injuries and are well equipped to devise the means of preventing them. The needed incentive would be provided by the Association's power to penalize disregard of safety standards.

It may be urged against the considerations here adduced that the proposed plans are "paternalistic" and that government ought not to assume any duty which can be performed by private enterprise. The arguments are inapposite. Accident relief is essentially a police function undertaken in the interests of social justice and of efficient citizenship. By what instrumentality such a function shall be discharged is not to be settled by an academic theory, whether of paternalism or of *laissez faire*, but is purely a question of relative efficiency. British and American experience has abundantly shown that commercial liability insurance is expensive, wasteful and ineffective to attain the ends in view. On the contrary both the State and the mutual plans have proven successful in practical operation. In the light of these facts, to enact a simple compensation law with optional insurance is to exalt the interests of casualty underwriters over those of employers, employees, and the public at large. Interstate railways, however, so far as they are subject to the law, might well be exempted from the obligation to insure their liability. The preference given to compensation claims over other debts of the employer will afford sufficient security to the employees of railroad corporations.

If the mutual plan is to be adopted, the scheme recommended by the majority of the Employers' Liability Commission of Iowa approximates rather closely the conclusions reached in the foregoing discussion. Membership in the proposed Indemnity Association is obligatory upon every em-

ployer who fails to reject the compensation plan. The Association is self-governing, though subject to the supervisory powers of the Industrial Commission. It assumes for its members all liability under the compensation act and has ample authority to fix rates, to make safety regulations, and to penalize their violation. Obviously this plan is a great advance upon the Massachusetts law, which exposes the State association to the competition both of stock companies and of other employers' mutuels. Its superiority to the four-fold options of the Michigan act are even more manifest. Nevertheless, the efficiency of the Iowa Association will inevitably be impaired by the quasi-voluntary character of the proposed law. It will be less able to exact suitable penalties for disregard of its safety rules and it will be forced to carry a much heavier surplus than would be necessary under a compulsory act. Furthermore, stock companies, unable to insure liability under the compensation act, may make specially low rates to employers who reject the plan. Such tactics, if employed, would go far to limit the economies and restrict the benefits of the entire scheme.

Apart from weaknesses which inhere in any non-compulsory plan, the Commission's proposals appear susceptible of improvements even within the limitations of a quasi-elective law. Three modifications of the proposed plan appear desirable: (1) State aid to the Association, (2) a different distribution of votes within the Association, and (3) provision for semi-autonomous industrial groups.

In the first place, the State as the final almoner of widows and orphans and of indigent invalids may well assume the administrative expenses of workmen's indemnity insurance. Justice requires that the consumers of goods should pay the whole cost of producing them, including compensation for injuries sustained in their production. Since this ideal can not be realized in a State system, the public can only be made to bear its just share of the burden through the medium of

taxation. On this ground the Swiss federal government donated \$1,000,000 to the National Accident Insurance Institute, and pays one-half of the yearly administrative expenses.<sup>767</sup> Hungary bears the administrative costs of the National Workmen's Sickness and Accident Insurance Fund.<sup>768</sup> Massachusetts also appropriated \$15,000 annually toward the expenses of the Indemnity Association.<sup>769</sup> Some such appropriation should be made by the General Assembly of Iowa. The State ought also to contribute something toward the reserve fund — say \$25,000 annually until the required reserve is accumulated. If this plan were adopted, the subscribers' annual contribution to the reserve fund could be reduced from ten to five per cent of the gross premiums. The measure of relief thus afforded is not to be regarded as a subsidy to particular industries, but as no more than justice to employers.

Again the Commission's plan of organization, borrowed from the Massachusetts act, appears to give undue weight to the small employers. It is desirable, of course, to prevent the domination of the Association by a few great employing corporations. Yet it would seem but just that those who will be called upon to pay the bulk of the contributions should have the controlling voice in the management. It might be well to allow, say, one vote for each one hundred employees subject to compensation, with the proviso that each member shall have one vote and that no one person, firm, or corporation shall cast, by proxy or otherwise, more than fifty votes. Some such apportionment would make the plan more acceptable to large employers, while it would not seriously jeopardize the interests of the smaller ones.

Finally, a single association, so heterogeneous as would necessarily be the case, might prove cumbrous in practical operation. It would perhaps be well, on this ground, to provide for semi-autonomous groups within the Association — for example, manufacturers, urban utilities, coal oper-

ators, gypsum and clay mine operators, building and construction contractors, and possibly others. The groups could administer their own insurance and safety regulations subject to the supervision of the Association and subject also to the obligation of contributing their respective quotas to the common reserve fund. Of course no attempt to create such groups should be made in the statute, but the Association might well be authorized to provide therefor in its own by-laws.

Whether the State or the mutual plan is adopted, classifications, risk ratings and insurance premiums should be determined, not by the statute but by the Association or the administrative board. Assessments upon the several industrial sub-groups should not, in either case, be based upon current experience in Iowa alone. Such a method, as applied to some of the smaller groups would practically require one or more establishments to carry their own risks. It is only where large numbers are involved that the rule of averages applies. Hence Iowa experience should be supplemented by that of Massachusetts and of other States which provide adequate and trustworthy accident statistics. Deficits in a particular group due to chance fluctuations from year to year should be made good from the reserve fund to which all the groups contribute. In this way each group, during a long term of years, would provide its own indemnities.

#### BURDEN OF INDEMNITIES

The principle of occupational risks requires that the burden of accident indemnity shall be imposed upon employers in the first instance, and upon consumers ultimately. Workmen's collective insurance is, indeed, preferable to individual assumption of industrial risks, but it is not a method of accident indemnity. The pecuniary costs of work injuries ought not, in justice, to be borne either by the particular sufferers therefrom or by wage-workers as a class.



Since, however, the principle of occupational risks can not be fully realized within the limits of one State, it may be urged that workmen should share with their employers that part of the burden which can not be taxed to consumers. To judge from testimony taken by the Iowa commission, this view is so widely held by the employers of this State <sup>770</sup> as to call for some consideration here. The arguments advanced in favor of requiring contributions from employees will be discussed in the inverse order of their importance.

To begin with a far-fetched bit of philanthropy, it is insisted that insurance provided wholly by employers will pauperize the insured, weaken their manhood, and impair their self-respect. Such solicitude for the *morale* of wage-earners is most commendable, but appears to be misplaced. The hazards of industry are as much a part of the worker's undertaking as the labor he performs, and indemnity for injuries occasioned by these hazards is no more charity than wages are a gift.

The employer's claim to be relieved of a part of the financial burden of accident indemnity is entitled to more consideration. It would seem, however, that this relief should be provided by the general public. A small contribution, such as the Ohio law contemplates, is of little importance to employers. On the other hand, to deduct from wages a substantial share of the insurance premiums is to violate current ideals of social justice.

Lastly, it is contended that participation in the burdens, as well as the benefits, of accident relief will quicken the collective interest of employees in accident prevention, and more particularly in the detection of fraudulent claims. This contention appears to be sound as applied to the German system. Under the German law, it will be remembered, cases of temporary disability are cared for by workmen's mutual sickness insurance societies. Such organizations not only have a direct interest in keeping down assessments,



but are able to exercise effective surveillance over their members.

It is to be observed, however, that machinery for collective action by the insured is vital to the efficacy of such a plan. The mere payment of a few cents per week into a fund administered by employers, or even by the State, will never induce one workman to spy upon another who claims a disability benefit. The interest of the individual is too slight, and individual surveillance too difficult, to be effective. If large results in the direction contended for are to be obtained, there must be a local organization of employees, a visiting committee, and a separate fund, supported and administered by the workmen and allocated to the relief of temporary disability. There is much to be said in favor of such a scheme, particularly if associated with sickness insurance.

If the contributory plan is adopted the worker's contributions should be set apart as a sickness and temporary disability insurance fund, charged with the payment of disability benefits for a certain number of weeks. The fund should be administered, either by local workingmen's societies or by the State insurance department through the medium of such societies. The arrangement would thus be compatible with either State or employers' mutual accident insurance.

In accordance with conclusions already reached, the contributory plan, if adopted, should not be made a pretext for saddling the workers with a substantial part of the accident indemnity burden. Medical relief to the injured ought still to be provided by employers and benefits paid in cases of permanent disability ought to be re-imbursed to the sickness insurance fund. Finally, except as an integral part of some such plan as that outlined above, it does not comport with the principles of accident indemnity to exact any contribution from employees. Particularly is it inadvis-

able to require such contribution to a fund administered wholly by employers.

#### EMPLOYMENTS COVERED

The coercive features of the Commission's bill extend only to the State and its sub-divisions and to private employers of five or more workmen. The practical effect of this limitation will be to exclude agriculture, domestic service, and the very small employers. Similar restrictions are found in most of the indemnity acts thus far adopted in this country, and they are defended on practical grounds. Ethically, of course, the farm laborer who loses his hand in a corn shredder, the blacksmith's helper whose eye is put out by a flying sliver of white hot iron, and the carpenter who falls from a ladder while employed by a householder for a bit of repair work has the same right to compensation as a railway trainman who is disabled in the service. Nor can it be maintained that the risk of such injuries is slight. Agriculture, thanks to modern machinery, has become in some degree a hazardous occupation, and small employers notoriously are careless of safety requirements.

Notwithstanding these considerations, there are good grounds for approving the Commission's recommendation. In the current state of public opinion a bill which should embrace farm hands, domestic servants, and small employers in manual trades would stand little chance of passage by the General Assembly of Iowa. Nor would it be easy to provide for a great number of petty employers and of casual employees in the early stages of an insurance system. The calculation and collection of premiums for farm hands and domestic servants would be a difficult matter and the administrative expenses would impose an excessive overhead charge. Moreover, much the greater part of agricultural workers in this State are farm owners, or tenants and their families. The need of agricultural accident indemnity is,

therefore, by no means so pressing as in European countries where the system of hired labor more generally prevails. The number of domestic servants also is not large, nor their exposure to injury great. Not so much can be said for the exclusion of small employers in other occupations, but no great harm can result therefrom. Ultimately the principle of occupational risks should extend to all employments, regardless of size or character, but it will be enough for the present to provide relief in those employments which embrace the vast majority of industrial wage-workers. Other employments can and should be added at an early date.

#### INTERMEDIATE EMPLOYERS

The intermediate employer plays an important, and apparently an increasing, role in modern industry. He may be a sub-contractor who performs a distinct portion of the principal undertaking, a piece worker who hires his own helper, or a "padrone" who supplies and directs a gang of workmen at so much per man per day. In any case the intermediary is not the real employer or responsible head of the business. He is apt to be impecunious; and to hold him liable for the compensation of injuries is to provide an insubstantial remedy. The Iowa Commission has accordingly proposed that "all employees employed in the execution of the work, whether under the first or any one of sub-contractors shall be regarded as engaged in one joint enterprise or business" (Section 7 *c*). This provision is supportable on the same grounds as the mechanic's lien.

#### INJURIES INCLUDED

As to the employments and workmen included, the proposed compensations apply to "personal injury arising out of and in the course of the employment" (Section 1). This language, as was mentioned in another connection, is taken from the British Workmen's Compensation Act, except that

it omits the phrase "by accident", which in that act qualifies the expression, "personal injury". The precise effect of this change can not be determined in advance of judicial construction, but since intentional injuries are otherwise provided for no harm can result from the omission. "Injury", it is expressly stated "shall not include a disease except as it shall result from the injury" (Section 17 *g*), but shall include death so resulting (Section 17 *d*). "Personal injury arising out of and in the course of such employment shall include injuries to employees whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business" (Section 17 *e*).

These express definitions are necessary to secure certainty and uniformity of administration. Want of similar explicitness in the earlier English acts caused a large amount of litigation and much highly technical construction. On this ground, the statement as to occupational disease might be made even more explicit. Hernia, for example, often manifests itself gradually as the result of repeated strains without being definitely traceable to any one occurrence. Shall such a case be regarded as a personal injury? Shall aggravation of an injury to the lungs by the inhalation of dust be treated as a case for compensation? Of course no form of expression can be devised which will provide for every contingency that may arise, but it is desirable to leave as little as may be to future determination by the courts.

Compensation is denied for any injury caused by the employee's wilful intention to injure himself or another or sustained while the employee was intoxicated (Section 2). No exception can be taken to these provisions as applied to the injured workmen. There is less reason for denying compensation to the dependents in fatal cases. The beneficiaries

in such cases are innocent of wrong-doing, and suicide for the benefit of heirs is a contingency which need not be guarded against. The omission of "gross negligence" or "wilful misconduct", as grounds for denying compensation, is to be commended. The only reasons for denying compensation in any case are to promote safety and to prevent fraud. But the chance of recovering compensation seldom influences a workman's conduct in the usual course of his employment. Neither negligence nor breach of discipline is, ordinarily deliberate or calculated.<sup>771</sup> To deny compensation for such offenses would have little tendency to prevent either injuries or fraud. Such misconduct can be more effectually dealt with through the employer's power of discipline and the penal law. The removal of machine guards, however, might well be treated as conclusive evidence of deliberate intention to injure self or others.

#### SCALE OF COMPENSATION

Full compensation upon the principle of occupational risks includes (1) the reasonable expenses of burying the killed, (2) the cost of alleviating the sufferings of the injured and of restoring their earning capacity where practicable, (3) the net wage loss of the disabled during the entire period of incapacity, and (4) the net income loss of those dependent upon the deceased throughout the duration of such dependency. Anything less than this is, by so much, less than justice.

Imperative convention requires what is styled a "decent burial" for the dead — a requirement which notoriously imposes a heavy burden upon working-class families. This hardship is all the greater in the case of an accidental death which deprives the family of its main source of income at the very time when it is called upon to meet an extraordinary expense. So much of this outlay as custom makes necessary is rightly to be considered a cost entailed by the acci-



dent. Hence the Iowa Commission has very properly recommended that an allowance of not more than \$100 shall be made in every case of death resulting from a work injury.

The expense of caring for the injured and of restoring their earning capacity is, likewise, peculiarly a cost chargeable to the industry which occasioned the injury. Not justice only, but every consideration of expediency as well, requires that medical, surgical, and hospital care, nursing, and medicines and therapeutic supplies shall be furnished as needed in all cases of work injury. The importance of such relief in securing prompt and expert medical treatment, preventing disability from minor injuries, shortening the duration of incapacity in more serious cases, and detecting simulation and malingering were pointed out in discussing the German system. Probably no other form of relief yields as large returns in proportion to its cost.

The limitation proposed by the Commission — four weeks and \$100 — while adequate in most cases would be insufficient in others. The Industrial Commission should be empowered to grant additional relief where needed. The Indemnity Association, or a branch thereof, should be authorized to furnish attendance through its own medical staff and to remove patients to any recognized hospital when hospital care is necessary, the refusal of such attendance to forfeit the right of relief. Free choice of physicians by the victims of work accidents is more likely to promote quackery and imposition than to serve any legitimate end.

Disability and dependent pensions ought, upon the principle herein accepted, to be a percentage only of full wages. Dependents in fatal cases are spared the maintenance as well as the earnings of the deceased. Invalid workmen, also, are saved such expenses as the cost of tools, working clothes, and street car fare. Besides, if disability entailed no loss of income, the temptation to feign or to prolong incapacity would often prove irresistible. Upon such considerations

as these the German government after careful inquiry fixed upon sixty-six and two-thirds per cent of average wages as the proper indemnity for cases of total incapacity. It may be mentioned, for the sake of comparison, that Switzerland awards seventy per cent, Ohio sixty-six and two-thirds per cent, California and Wisconsin sixty-five per cent, while Great Britain and a number of American States allow but fifty per cent. The Iowa Commission has recommended pensions equal to sixty per cent of wages, which may be regarded as reasonably sufficient. Full wages ought, however, to be allowed in cases of such helplessness as to require the attendance of a nurse.

The specific compensations proposed for enumerated permanent injuries may work injustice in certain cases. The loss of a thumb, for example, is a much more serious disability in some employments than in others. Upon the whole, however, the advantages of such a schedule in securing definiteness and facilitating administration probably outweigh the objections.

In the Iowa Commission's proposed bill, as well as in all the statutes thus far enacted in this country, dependent and disability benefits are alike limited to a maximum weekly sum. Nevertheless, the imposition of such a maximum does not accord with the fundamental principle of work accident indemnity. Justice not charity, income loss not need, is the basis of the claimant's right. Viewed in this light, a brick layer or a linotype operator is not indemnified for incapacity by a grant of \$12 per week. True, he may thereby be protected from absolute want but his standard of life will be injuriously lowered and his children will be denied educational opportunities which a just compensation would have secured to them. Proportionate indemnity to skilled workers is not merely just; it also affords added incentive to accident prevention. Nor will the cost of such indemnity be

a higher proportion of pay-roll in the case of skilled than of unskilled workmen.

There is still less justification for the arbitrary stoppage or reduction of pensions at the end of a certain period. A man totally incapacitated for life, or a widow with a number of small children, stands no less in need after the lapse of a half dozen years than at the time of the accident. Pensions ought to continue throughout the period of incapacity or dependence — an invalid's until death or recovery, a widow's during widowhood, a child's until the full age of sixteen years.

It appears from the foregoing that the compensations proposed by the Iowa Commission are below the standard set up by the principle of occupational risks. Nevertheless, some employers may insist that the Iowa Commission's schedule is unduly high and will place them at disadvantage in competition with the producers of other States. This contention will repay careful sifting.

The competitive influence of accident indemnity rates is most pronounced as between adjacent communities. On distant shipments, the effect of differences in this particular is much less consequential. Hence a comparison of the proposed compensations with those now effective in adjoining States will be sufficient for the present purpose. It will be observed from Table VIII that the proposed Iowa rates are appreciably lower than those of Wisconsin and not higher, upon the whole, than those of Illinois. Kansas allows somewhat lower benefits, though insurance rates under the compensation act of Kansas are, strangely enough, higher than in either Illinois or Wisconsin. Upon the whole, Iowa employers under the proposed law would be at no disadvantage in competition with those of Illinois, Kansas, or Wisconsin — and this would be true even were stock company insurance to be continued in Iowa as in the other States. If the mutual or State insurance plan is adopted, and particu-

larly if the State assumes the administrative expenses thereof — as it ought in fairness to do — the actual cost of accident indemnity in this State will be less than in any of the above-mentioned Commonwealths. With respect to other adjacent States, compensation laws are pending in Minnesota, North Dakota, Nebraska, and Missouri — though what sort of legislation, if any, will be enacted can not at this writing be foretold.

TABLE VIII

COMPENSA- TIONS	IOWA COMMIS- SION'S BILL	ILLINOIS	KANSAS	WISCONSIN
Funeral	All cases, \$100	No dependents, only, \$150	No dependents, only, \$100	No dependents, only, \$100
Medical aid	4 weeks, \$100	8 weeks, \$200	None	90 days
Death bene- fits to total dependents	60% of wages for 300 weeks Maximum \$3600 Minimum \$1500	50% of wages for 8 years Maximum \$3500 Minimum \$1500	3 years' wages Maximum \$3600 Minimum \$1200	4 years' wages Maximum \$3000 Minimum \$1500
Total disa- bility bene- fits	60% of wages for 400 weeks. Limits \$12 and \$5 per week. After 400 weeks, \$10 to \$25 per month	50% of wages for 8 years. Limits \$12 and \$5 per week. After 8 years, 8% of death benefit annual- ly	50% of wages for 10 years. Limits \$15 and \$6 per week	65% of wages for 15 years. Maximum total \$3000
Temporary disability benefits	After 2 weeks 60% of wages. Limits \$12 and \$5 per week	After 1 week, 50% of wages. Limits \$12 and \$5 per week	After 2 weeks, 50% of wages. Limits \$15 and \$6 per week	After 1 week 65% of wages. Limits \$9.38 and \$4.69

In the second place, it is easy to exaggerate the importance of indemnity rates as a factor in inter-State competition. Uniform costs of production over any large area are a fiction of cloister economics. Every community has its own particular advantages and disadvantages in the way of wages, freight rates, market facilities, and the cost of fuel and materials. Compared with these items accident indemnity is but a bagatelle. A difference of \$1 per \$100 of pay-roll would amount to less than two cents per ton of coal. Moreover, even under the common law, liability insurance varies as much as three hundred per cent from one State to an-



other.<sup>772</sup> At the present time Minnesota, the two Dakotas, Nebraska, and Missouri retain common law liability; while Kansas, Illinois, and Wisconsin have compensation acts of varying scope and widely different rates of indemnity. To equalize competitive conditions with all these neighbors is out of the question. The attempt would be the more futile in that, as already seen, four neighboring common law States are likely to adopt compensation systems during the current legislative year. In view of the action taken and to be taken by the several States, uniformity is not to be expected for a good many years to come. The State of Iowa ought not to be deterred, therefore, by such considerations as the foregoing, from adopting a reasonably adequate scale of compensation.

Whatever disagreement may exist over the amount of compensation, there can not well be two intelligent opinions with respect to the form of payment. Wage-workers and their families are unfitted by training and experience to engage in independent business ventures. Few opportunities for safe and profitable investment are open to them. To pay indemnities in lump, therefore, is to offer special facilities to the vendors of gold bricks.<sup>773</sup> Even the weekly payments should be carefully safeguarded against improvident contracts of debt. The Iowa Commission's proposed bill (sections 15 and 20) fairly meets both requirements.

#### PROVISIONS AGAINST FRAUD

To protect the employer against fraudulent claims, the proposed act contains the usual clauses as to notice of injury and medical examination of invalid pensioners. For the same reason, no compensation is payable in respect of the first two weeks' disability. Denial of compensation for self-inflicted injuries and the fixing of pensions at a portion only of the pensioner's usual earnings operate in the same



direction. These restrictions, with efficient administration, should prove sufficient for the purpose in view.

#### ADMINISTRATION

It can not too often or too strongly be insisted that adequate administrative machinery is indispensable to the success of the proposed legislation. The point is obvious and will be admitted without argument as respects a State insurance plan. If insurance is to be managed by an employers' association, State control is no less necessary to protect the rights of workmen. Finally, a simple compensation act does not obviate the need of supervision to prevent unconscionable settlements by the employer or the liability company and to minimize litigation.

To meet this need the Commission's bill creates the Iowa Industrial Commission. The Indemnity Association's safety regulations, risk ratings, classifications, premiums, and policies are subject to the approval of the Industrial Commission, as are also all settlements between the Association or its members and injured employees or their dependents. The Commission is empowered to make rules for carrying into effect the provisions of the compensation act, to subpoena witnesses, administer oaths, and compel the production of books and papers pertaining to any inquiry before it. If State insurance should be adopted, the Industrial Commission would, of course, exercise still wider powers.

To these functions the Employers' Liability Commission proposes to add those now vested in the Iowa Bureau of Labor Statistics.<sup>774</sup> This suggestion, borrowed from Wisconsin, is eminently worthy of adoption. There would be a notable gain in economy and efficiency from unified administration of the various labor laws. The work of accident prevention, including factory inspection and the collection of accident reports, ought obviously to be performed by the board which administers the compensation act. Factory

inspection necessarily carries with it the enforcement of the child labor law and of other statutes designed to secure the health and safety of employees. It would be absurd to maintain a separate bureau for the remaining duties of the Labor Commissioner. The same reasoning applies, of course, to the office of State Mine Inspector.

Accordingly, the Industrial Commission should be entrusted with the administration of the compensation act, the various factory acts, the mine law, the child labor law, the statutes pertaining to fire escapes, boiler inspection and employment agencies, and all other labor laws enacted or to be enacted. It should be authorized to appoint a sufficient number of clerks, statisticians, inspectors, and experts to carry into effect the foregoing powers and to fix their compensations. Appointments by the Commission should, in all proper cases, be made under civil service regulations similar to those now applicable to State Mine Inspectors.

An administrative body vested with such broad powers ought, of course, to be carefully safeguarded against political control, but the method of appointment devised by the Iowa Commission to secure that laudable end can scarcely be termed a happy invention. Non-judicial duties ought not to be required of a court, and the nomination of administrative officers is anything but a judicial function. The danger that the court itself may thereby become involved in political controversies is at least as great as the chance that the Commission will be shielded from improper influence by such a mode of nomination. The Supreme Court, besides, has not necessarily any special fitness for the task which would thus be thrust upon it. The judges could wisely select a commission of lawyers, but legal talent is not the most essential requisite for the administration of workingmen's insurance.

Better results would probably be obtained by giving the parties most immediately affected by the proposed legislation a large share in the selection of its administrators. The

following suggestion looking to that end is submitted with much deference. (1) The Chairman of the Industrial Commission shall be appointed by the Governor, by and with the advice and consent of the Senate, from a list of three qualified attorneys at law nominated by the Supreme Court of Iowa. (2) One Commissioner shall be similarly appointed from a list of three persons nominated by the Executive Council of the Iowa Federation of Labor, of which nominees one at least shall not be a member of the said Federation. (3) The third Commissioner shall be appointed in like manner from a like list nominated upon the same condition by the Board of Directors of the Employers' Indemnity Association of Iowa. Pending the formation of said Association, or in case State insurance is adopted, appointment shall be made from three nominees of whom two shall be named by the Iowa Manufacturers' Association and one by the Iowa Coal Operators' Association.

Under this plan, the Chairman of the Industrial Commission would be a lawyer of standing, able to act as *ex officio* counsel to the Commission, and to serve as umpire in any case of disagreement between his two associates. The heavy pecuniary stake of both the Federation and the Association should guarantee fit nominations, while the public interest would be sufficiently safeguarded by the method of appointment.

The proposed prohibition of political activity by members of the Industrial Commission and the requirement that all recommendations for appointments shall be of public record are eminently proper. It might be well to add participation as a delegate or alternate in the proceedings of any political party convention to the list of prohibited acts. The ten year term recommended by the Liability Commission apparently is designed as a further precaution against political influence, but it would serve as well to attract high grade men

and would enable the members to become expert in the performance of their important duties.

All the pains expended upon the constitution of the Industrial Commission will be but labor wasted unless adequate financial support is provided. The Commissioners' salaries must be fairly liberal to secure capable administrators. Five thousand dollars is the amount fixed upon by California, Massachusetts, and Wisconsin, and this sum is probably not too large for the purpose in view. The services of a consulting actuary will be needed to pass upon the classifications, risk ratings, and premium tariff of the Indemnity Association. A statistician must be employed if the Commission's accident records are to be of the largest service to the State. The present inadequate inspectional staff should be immediately increased. A secretary and a moderate clerical force will be required; and it will probably be necessary, as soon as the law becomes generally effective, to appoint an examiner of claims. There should be a traveling "safety exhibit", such as the Industrial Commission of Wisconsin has maintained with excellent results during the past summer. Lastly, the expenses of the Arbitration Committees, to be later described, should be borne by the Commission. All this will require at least \$50,000 per year. The Industrial Commission of Wisconsin spends about \$75,000 annually.<sup>775</sup> California <sup>776</sup> appropriated \$50,000, and Michigan <sup>777</sup> \$25,000 for the expenses of their industrial accident boards, which have much narrower functions than those here contemplated.

Champions of "strict economy" — except for purposes of patronage — will object to the seemingly large appropriations contemplated in these pages. It should be remembered, however, that governmental economy is not to be judged by expenditure alone, but as well by the results obtained. The great objects of the proposed legislation — the alleviation of human suffering, the saving of human life, the



prevention of undeserved poverty, the securing of justice, and the promotion of better relations between employers and employees — would justify a much larger outlay of public money than is here suggested. The whole amount required for the support of the Industrial Commission and for the assistance of the Indemnity Association, including the donation to the reserve fund, would not exceed \$100,000 per year. Most, if not the whole, of this sum would be directly saved to tax-payers in smaller court costs and decreased demand upon public charity. It is well known that personal injury litigation, under the present system, employs much of the time of the district and supreme courts and that almshouses are filled, to no small extent, with the victims of work accidents.

#### ADJUDICATION OF CLAIMS

The evils of personal injury litigation under the existing system were emphasized in another part of the present study, and are, indeed, too well known to require much amplification. What legislators in certain States appear to have overlooked is that these evils can not be cured by a compensation act administered through the ordinary courts. Even the summary process provided by New Jersey and Rhode Island is an inadequate remedy. Judges find it difficult to disassociate themselves from the habit of litigious procedure, technical construction, and insistence upon formal correctness — habits which are serviceable and necessary in ordinary judicial procedure, but which are out of place in the administration of accident relief. Indeed, the very qualities which make a judge proficient in his proper sphere unfit him for the performance of administrative duties. Besides, the courts are not in continuous session and are too much occupied with other matters to pass upon every settlement between an injured workman and his employer or to determine, with reasonable promptness, every dispute which may arise out of industrial injuries. Court administration,



therefore, means needless lawsuits, with resultant expense, delay and bitterness. It means also that workmen and their dependents will be pressed into accepting inadequate settlements and that much of the money paid out by employers will be diverted from the beneficiaries.

Tested by the above considerations, the procedure recommended by the Iowa Commission leaves little to be desired. Friendly settlements are encouraged and the arbitration of disputes is compulsory. Every pretext to a jury trial is taken away. Judicial review is limited to questions of law, and practically is confined to the Supreme Court, since the District Court can only enter a decree in accordance with a memorandum of agreement or in pursuance of the findings of an Arbitration Committee or of the Industrial Commission. The limitation of attorney's fees will tend still further to discourage litigation by lessening the temptation thereto. At the same time the rights of claimants are sufficiently safeguarded by the control of the Industrial Commission over settlements and arbitrations. There can be little doubt that these proposals are constitutional, at least as applied to a quasi-elective act or to a State insurance law.

It may prove impracticable, when once the new law is in full operation, for members of the Commission to serve on all Arbitration Committees. Should such a situation arise, it could readily be met by appointing an examiner of claims. Exception may be taken to the proposed division of arbitration costs. Such costs are properly an administrative expense which ought not, in fairness, to be imposed upon the employer nor deducted from the compensations awarded. The fees of arbitrators, witnesses, and medical examiners might well be paid by the State. To discourage pertinacious litigation, the Arbitration Committee should be empowered to tax such costs to either party when, in its opinion, equity so requires.

If State insurance is adopted the primary determination

of claims will naturally be vested in the Industrial Commission, aided perhaps by claim examiners. Arbitration committees would of course not be needed. Judicial review of the Commission's decisions could be limited to grounds of fraud, want of jurisdiction, or insufficiency of the facts found by the Commission to support its decision.

It is doubtful whether litigious proceedings can be avoided under a simple compensation act. Even the summary court procedure proposed by Mr. Baldwin's bill is of questionable validity as applied to a compulsory law. Disputed claims under such an act are controversies between private parties and would seem to be within the jury trial guarantee of the Constitution of Iowa.

#### ACCIDENT PREVENTION

Full accident records, intelligently organized, adequate safety regulations, and rigorous enforcement thereof are the great requisites of accident prevention. The Iowa Commission's proposals in each of these particulars are admirable.

If accident prevention is to make notable progress, the precise manner in which accidents occur must be definitely known. If indemnity insurance is ever to rest on a scientific basis, not merely the number but the character of work injuries, the extent and duration of disability, and the wage loss incurred must be accurately tabulated for a long term of years. The extant accident statistics of this State, if indeed they may be dignified by such a term, are substantially worthless for either purpose. The Railroad Commissioners and the State Mine Inspectors publish the number of work injuries, distinguished as fatal and non-fatal, and grouped under general causes, such as falls of slate and coal, derailments, and the like. Such classifications throw very little light upon the problem of prevention and still less upon that of insurance. The Bureau of Labor, being dependent upon

annual and practically voluntary reports from employers, is unable to indicate even the number of accidents in industries other than coal mining and railroad transportation.

To supply what the present laws fail to furnish the Iowa Commission's proposed bill (Section 38) requires every employer to keep a record of *all* injuries sustained in his employment and to report every accident to the Industrial Commission within forty-eight hours after its occurrence. Upon the termination of the disability, or after the expiration of sixty days if incapacity continues so long, a supplemental report must be made. The reports must state the name, age, sex, and occupation of the injured employee, the date and hour of the accident, the nature and cause of the injury, and such other information as the Industrial Commission may require. Failure to report is punishable by a fine of not more than \$50.

The "other information" referred to should include the race, nativity, and conjugal condition of the injured, the wage rate received at the time of the accident, the precise manner of the injury, and, if caused by machinery of any kind, the mode, if any, in which the same was guarded. The supplemental report should give the facts as to compensation, medical relief, and degree of recovery. All other information called for should be supplied, so far as possible, in the first report.

The foregoing data, properly tabulated, will provide a body of accident statistics comparable in thoroughness and value with the German records — the conceded standard of excellence. It is important that minor as well as serious injuries be reported. Full records are required to reveal the cause of accidents and the most efficient means of preventing them. Race, sex, nationality, and time and manner of occurrence are significant in the same connection. The other facts above referred to are needed for the administration of insurance. Lastly, if the records are to be of use, the

data must be so tabulated as to reveal significant facts. It is for this reason that the services of a statistician — not a mere clerk — are necessary.

The attempt to embody safety regulations in statute law has never yielded satisfactory results in Iowa or elsewhere. The mass of detail is too great and conditions are too varied, complex, and changeable, to be successfully dealt with by the legislature. It is not enough to prescribe that "all machinery shall be properly guarded".<sup>778</sup> What constitutes a proper guard under such a statute is a question of fact, to be determined by the courts in criminal prosecutions and civil suits for damages. The question is likely to be differently determined upon the same state of facts in these two classes of proceedings and the method is at best a clumsy one, slow, and inadequate. What is needed is a precise definition of the proper and requisite guards for each particular kind and type of machine under given conditions. The like may be said of methods of work, clothing of workmen, warning signals, dust removal, ventilation, and all the other manifold circumstances that affect the worker's safety, health and comfort. The detailed regulations necessary can not be prescribed by the legislature nor can they well be left to factory inspectors or to a single-headed bureau.<sup>779</sup>

Wisconsin has found a solution of the difficulty, suggested by European experience. The law prescribes, in general terms, that every place of employment shall be safe for employees therein and for frequenters thereof, and that every employer shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment safe, and shall do everything reasonably necessary to protect the life, health, safety, and welfare of employees.<sup>780</sup> The Industrial Commission is empowered to make general or special orders, having the force of law, in pursuance of this require-



ment and containing the detailed regulations necessary to give it effect.<sup>781</sup>

A similar plan has been recommended by the Iowa Commission<sup>782</sup> and ought to be adopted. The existing laws of Iowa relating to the safety and sanitation of working places are far from adequate. Gypsum and clay mines, harvesting machinery, stone quarries, bake shops, tenement labor, and construction work, to mention a few glaring examples, are nearly exempt from regulation. The present affords a favorable opportunity to cure these defects by enacting a general law similar to that of Wisconsin. The Indemnity Association, created by the compensation act, would be peculiarly fitted to coöperate with the Industrial Commission in framing an efficient and practical safety code. Enforcement of the regulations so devised would not depend upon the ineffectual method of criminal prosecutions. Violation of a safety rule would be ground for higher insurance rates. Accident prevention would become a business proposition. The like result can not be attained in any other way than by compulsory mutual or State insurance.

The proposed plan provides effective machinery for the administration of the safety laws. The Industrial Commission's inspectors would be supplemented by the field agents of the Association, and the self-interest of employers would be enlisted on behalf of all reasonable regulations. To a considerable extent work accidents are due to sheer ignorance of preventive measures. Both employers and workmen require education in safe methods of work. For this reason the Industrial Commission of Wisconsin maintained, during the past summer, a traveling safety exhibit, assembled by Mr. C. W. Price of the International Harvester Company, and embodying ideas suggested by the experience and experimentation of many employers in this country and abroad.<sup>783</sup> A similar device would probably yield large results in Iowa. In time the accident records of the Industrial



Commission and the accumulated insurance experience would furnish a mass of comparative data which could be turned to account for scientific accident prevention. Meanwhile, and above all, this educative work would be consistently followed up by adequate pressure upon any employer who might fall below the standard set by the safety rules.

#### CONCLUSION

The conclusions reached in the foregoing pages mutually support each other. Substantially all students of the subject agree that occupational risks afford the only scientific or equitable basis of accident indemnity. Experience has shown that compulsory insurance is the sole method whereby the principle of occupational risks can be given full effect. The obligatory insurance must be conducted exclusively by the State, or by a single State-aided mutual association, in order that adequate indemnities may be provided without unduly burdening employers. A special administrative board is necessary, either to administer the State fund or to protect the rights of workmen under the mutual plan, and to provide for the prompt and economical determination of claims. That the machinery created for this purpose should be utilized for the administration of other labor laws as well is too plain for argument. Lastly, and not least of all, both the insurance plan and the administrative provisions tend powerfully to promote accident prevention.

## NOTES AND REFERENCES



## NOTES AND REFERENCES

<sup>1</sup> See *Official Directory of the Iowa Federation of Labor*, 1911, pp. 201 *et seq*; *Proceedings of the Iowa State Manufacturers Association*, 1911.

<sup>2</sup> See below, Chs. IV, V.

<sup>3</sup> There are no trustworthy records of work accidents in the whole United States. Probably the most reliable estimate is that of Mr. Frederick L. Hoffman in *Bulletin of the United States Bureau of Labor*, No. 78, p. 458. The statement in the text as to the number of "disabling accidents" is based on the accurately recorded experience of the German Empire that approximately one-fourth of the accidents reported cause disability for more than one week.

For other estimates see Hard's *Injured in the Course of Duty*, Ch. II, p. 39; Professor Falkner in the *Proceedings of the Ninth Annual Meeting of the National Civic Federation*, 1908, p. 156.

<sup>4</sup> Compare Strong's *Our Industrial Juggernaut* in *The North American Review*, Vol. 183, pp. 1030, 1031.

<sup>5</sup> On the possibilities of accident prevention see Schwedtman and Emery's *Accident Prevention and Relief*, Ch. VI; Eastman's *Work Accidents and the Law*, Ch. VII; Seager's *Social Insurance*, pp. 28-32; *Bulletin of the United States Geological Survey*, No. 333; *Bulletin of the United States Bureau of Labor*, No. 78, pp. 457, 458, No. 90, pp. 437-674, especially 615-622.

<sup>6</sup> Cited from Schwedtman and Emery's *Accident Prevention and Relief*, p. 34. The figures quoted are for 1908. For the statistics of 1907 and of the preceding decade see *Bulletin of the United States Bureau of Labor*, No. 92. For the entire period, 1885 to 1907, see *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. I, pp. 1146, 1147.

<sup>7</sup> For comparisons see *Bulletin of the United States Bureau of Labor*, No. 78, p. 458.

<sup>8</sup> See *Bulletin of the United States Bureau of Labor*, No. 92, pp. 15 *et seq.*

<sup>9</sup> For graphic illustration of this point see Fitch's *The Process of Steel Making in Charities and the Commons*, Vol. 21, pp. 1065-1078; also Fitch's *The Steel Workers*, Ch. VII, and the chapter entitled *Making Steel and Killing Men* in Hard's *Injured in the Course of Duty*.

<sup>10</sup> "The genius of our present remarkable industrial development requires that he [the workman] carry on his patient toil in company with veritable armies of fellow men, many of whom he can neither see nor know; it surrounds him with mighty and complicated machinery driven by forces beyond his control, whose relentless strength rivals that of the thunderbolt itself; and it requires him to labor day by day with faculties at highest tension in places where death lurks in ambush at his elbow, awaiting only a moment's inadvertence before it strikes." — Remarks of Chief Justice Winslow (Wisconsin) in *Driscoll vs. Allis Chalmers Company*, 129 Northwestern 401, 408.

<sup>11</sup> See Veblen's *The Theory of Business Enterprise*, Ch. IX.

<sup>12</sup> Compare what is said on this point in the *Twenty-fourth Annual Report of the Interstate Commerce Commission* (1910), p. 188.

<sup>13</sup> The precise records of the German Imperial Insurance Office show that a disproportionately large number of accidents occur on the first and last days of the week and near the beginning and end of each working period. That is to say, after an interval of rest the worker requires an appreciable time to re-adjust himself to his mechanical environment; and, again, after a period of work his adjustment becomes impaired, and his attention and memory lapse, through fatigue. — See *Bulletin of the United States Bureau of Labor*, No. 92, pp. 23-33.

<sup>14</sup> Compare Goldmark's *Fatigue and Efficiency*, pp. 80-82.

<sup>15</sup> On the relation of fatigue to accident liability see Goldmark's *Fatigue and Efficiency*, pp. 71-79; Bogardus's *The Relation of Fatigue to Industrial Accidents* in *The American Journal of Sociology*, September and November, 1911, and January, 1912, Vol. XVII, pp. 206-222, 351-374, 512-539.



<sup>16</sup> Compare Veblen's *The Place of Science in Modern Civilization* in *The American Journal of Sociology*, Vol. XI, pp. 585-609.

<sup>17</sup> Mr. C. W. Price, of the International Harvester Company, stated to the writer, in August, 1910, that nearly ninety per cent of the 25,000 employees of that mammoth concern were unskilled, "mostly recent immigrants". Mr. John Fitch, of the Pittsburgh Survey, found that sixty per cent of the steel workers are unskilled, thirty-six or thirty-seven per cent are semi-skilled and only three or four per cent are skilled (*Charities and the Commons*, Vol. 21, pp. 1085, 1086). The "unskilled" referred to are peasants from South-eastern Europe (*Charities and the Commons*, Vol. 21, pp. 1051 *et seq.*). Similar peasants form the great bulk of the packing house workers (*The American Journal of Sociology*, Vol. XVI, pp. 433-468), of the steel mill operatives in South Chicago (*The American Journal of Sociology*, Vol. XVII, pp. 145-176) and of the anthracite coal miners (Roberts's *Anthracite Coal Communities*, Ch. I).

<sup>18</sup> See *Bulletin of the United States Bureau of Labor*, No. 92, pp. 60-65.

<sup>19</sup> Hard's *Injured in the Course of Duty*, pp. 38-40.

<sup>20</sup> Spahr's *Present Distribution of Wealth in the United States*, p. 69.

<sup>21</sup> Lewis's *State Insurance*, pp. 12-17; Holmes's *The Concentration of Wealth in the Political Science Quarterly*, Vol. 8, pp. 589-600.

<sup>22</sup> Lewis's *State Insurance*, pp. 10, 11, and authorities there cited.

<sup>23</sup> The sources drawn upon by the authorities cited in notes 20 to 22 inclusive.

<sup>24</sup> Nearing's *Wages in the United States*, pp. 211-214.

<sup>25</sup> Eastman's *Work Accidents and the Law*, pp. 129-131.

<sup>26</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, Part II, p. 134, Table 7.

<sup>27</sup> Eastman's *Work Accidents and the Law*, Ch. IX, especially pp. 133, 134.

<sup>28</sup> *First Report of the New York Employers' Liability Commission*, 1910, Part I, Appendix XIX, Tables IX, X, XI, and XVII.

<sup>29</sup> Henderson's *Industrial Insurance in the United States*, p. 149.

<sup>30</sup> Compare Lewis's *State Insurance*, Ch. I.

<sup>31</sup> Eastman's *Work Accidents and the Law*, pp. 119, 120.

In 59 cases the economic responsibilities of the deceased could not be learned.

<sup>32</sup> *Report of the Ohio Employers' Liability Commission*, 1911, Part I, pp. xxxvi-xliv.

<sup>33</sup> *First Report of the New York Employers' Liability Commission*, 1910, Part I, pp. 232, 233.

<sup>34</sup> *Thirteenth Biennial Report of the Wisconsin Bureau of Labor Statistics*, 1907-1908, p. 13.

<sup>35</sup> Compiled by the writer from the *Reports* of the State Mine Inspectors and of the Railroad Commissioners.

<sup>36</sup> See *Biennial Reports of the Iowa Bureau of Labor Statistics*.

<sup>37</sup> Compare Downey's *History of Labor Legislation in Iowa*, pp. 100, 101.

<sup>38</sup> *Review of the First Eight Months' Operation of the Workmen's Compensation Act*, a leaflet issued by the Washington Industrial Insurance Commission in June, 1912.

<sup>39</sup> *Report of the Michigan Employers' Liability and Workmen's Compensation Commission*, 1911, p. 9.

<sup>40</sup> *Bulletin of the Industrial Commission of Wisconsin*, No. 3, p. 87.

<sup>41</sup> "But practically it happens, as though through some inadvertance, that in making a contract of the greatest possible moment, both parties seem to ignore absolutely certain very important elements; the contract is made as though sickness, accidents, invalidity, and old age had been permanently banished from the earth."—Lewis's *State Insurance*, p. 7.

<sup>42</sup> Lord Abinger, in *Priestley vs. Fowler*, 3 Meeson and Welsby, 1, 5 (England, 1837), remarked upon the novelty of the questions presented. Mr. Justice Evans, in *Murray vs. South Carolina Railroad Company*, 1 McMullan 385, 397 (South Carolina, 1841) spoke of there being not a single precedent.

<sup>43</sup> This is clearly shown by Chief Justice Shaw's opinion in the Farwell case: "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, . . . best promote the safety and security of all parties concerned." — *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 58 (Massachusetts, 1842).

Lord Abinger likewise made much of the *argumentum ab inconvenienti*, in *Priestley vs. Fowler*, 3 Meeson and Welsby, 1, 5, 6 (England, 1837).

Compare Lewis's *State Insurance*, p. 84.

<sup>44</sup> Compare Bohlen's *The Rule in Rylands v. Fletcher* in the *Pennsylvania Law Review*, Vol. 59, p. 303.

<sup>45</sup> See Wigmore's *Responsibility for Tortious Acts: Its History* in the *Harvard Law Review*, Vol. VII, pp. 315-357, 383-405, 441-456. The learned author traces the development of the law of torts from the absolute liability for unintended wrongs of primitive Germanic custom to the "due care" test of liability in the nineteenth century.

<sup>46</sup> On these "absolute liabilities" for "acts done at peril", see Bohlen's *The Rule in Rylands v. Fletcher* in the *Pennsylvania Law Review*, Vol. 59, pp. 298, 306.

See also *Pollock on Torts*, First Edition, ch. XII.

<sup>47</sup> For an early English application of *sic utere tuo ut alienum non laedas*, see 20 Edward IV, *placita* 10 (1481).

<sup>48</sup> *Cooley on Torts*, Third Edition, pp. 690-705.

<sup>49</sup> *Cooley on Torts*, Third Edition, p. 16; *Turberville vs. Stamp*, 1 Comyns 32, 91, English Reports, 13 (1698).

<sup>50</sup> *Pollock on Torts*, First Edition, pp. 404-406. See also *Tona-wanda Railroad Company vs. Munger*, 5 Denio 255 (New York, 1848).

<sup>51</sup> *Fletcher vs. Rylands*, Law Reports, 1 Exchequer, 265, 282 (1866). Said Lord Blackburn: "There does not appear to be any difference in principle, between the extent of the duty cast on him

who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land, water, filth, or stench, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour . . . the duty is the same, and is, to keep them in at his peril."

This doctrine was upheld by the House of Lords in *Rylands vs. Fletcher*, Law Reports, 3 House of Lords 330 (1868). It was, however, quite generally repudiated in the United States, owing to different social and political conditions. — See Bohlen's *The Rule in Rylands v. Fletcher* in the *Pennsylvania Law Review*, Vol. 59, pp. 298-325, 373-393.

A similar rule had early been applied to the case of filth escaping without the fault of the owner. — *Tenant vs. Golding*, 1 Salkeld 21 (1704). "As one is bound to keep his cattle from trespassing on his neighbour's ground, so he must a heap of dung, if he erects it. *Sic utere tuo ut alienum non laedas*."

<sup>52</sup> See historical discussion by Mr. Justice Gray in *St. Louis and San Francisco Railway vs. Mathews*, 165 United States 1 (1896).

<sup>53</sup> *Powell vs. Fall*, Law Reports, 5 Queen's Bench Division, 597, 601 (England, 1880).

<sup>54</sup> The earliest "action on the case for negligence" brought by an employee against his employer, appears to have been that of *Priestley vs. Fowler*, 3 Meeson and Welsby 1 (England, 1837), wherein were announced or foreshadowed the doctrines of "co-service", and "assumption of risk" and the master's duty to use care for his servant's safety. That the workman assumes the risks of his employment, including the negligence of fellow servants, was broadly laid down in *Murray vs. South Carolina Railroad Company*, 1 McMullan, 385 (South Carolina, 1841). For other early cases, which, while authority for the fellow-servant rule specifically, contributed as well to the development of other employers' liability doctrines, see note 174 below.

<sup>55</sup> Bonar's *Philosophy and Political Economy*, Book III, Ch. II and III. Cunningham's *Growth of English Industry and Commerce*, *Modern Times*, Part II.

<sup>56</sup> Toynbee's *The Industrial Revolution*.

<sup>57</sup> "Very appropriately, this exception [the fellow-servant rule] was first announced in South Carolina, then the citadel of human slavery. It was eagerly adopted in Massachusetts, then the center of the factory system, where some decisions were then made in favor of great corporations, so preposterous that they have been disregarded in every other state, without even the compliment of refutation. It was promptly followed in England, which was then governed exclusively by landlords and capitalists." — Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Introduction, p. VI.

<sup>58</sup> See Veblen's *The Theory of Business Enterprise*, Ch. IV, and authorities there cited.

<sup>59</sup> "So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no not even for the general good of the whole community." — Blackstone's *Commentaries on the Laws of England*, Vol. I, p. 135.

Mr. Justice O'Neill, dissenting from the South Carolina Court of Errors in the Murray case, pointed out that if the fireman had been a slave leased to the railroad company his master would have had an unquestionable right to recover for his injury. — *Murray vs. South Carolina Railroad Company*, 1 McMullan 385, 403 (South Carolina, 1841).

<sup>60</sup> Smith's *Wealth of Nations*, Book IV, Ch. II.

<sup>61</sup> See Jefferson's Inaugural Address, March 4, 1801, in Ford's *Writings of Thomas Jefferson*, Vol. VIII, pp. 1, 4.

<sup>62</sup> Compare the language of Mr. Justice Winslow in *Borgnis et al. vs. Falk Company*, 133 Northwestern 209, 215 (Wisconsin, 1911).

<sup>63</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 22.

<sup>64</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 14.

<sup>65</sup> Chief Baron Abinger, in the Priestley case, instanced the coach-maker, the harness-maker, the coachman, the footman, the chamber-maid, the cook and butler — analogies which show that his lordship was thinking of house servants and handicraftsmen. He had nothing



to say of the applicability of his famous doctrine to factory hands, railway workers or coal miners — to whom it has most usually been applied. — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 5, 6 (England, 1837).

Similarly, Chief Justice Shaw speaks of the ability of one servant to know and guard against the negligence of a fellow servant in terms appropriate to the co-employees of a petty shop. Yet the great Chief Justice was actually deciding the case of a locomotive engineer injured by the negligence of a switchman as to whose acts or omissions he had no possible means of information. — *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 59 (Massachusetts, 1842).

It is noteworthy, in this connection, that the doctrine of vice-principalship was overthrown in England "by the wholly irrelevant *dictum* [in *Wilson vs. Merry*, Law Reports, 1 Scotch Appeals, 326, 332 (England, 1868)] of two superannuated law lords". — Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Introduction, p. vi.

<sup>66</sup> Blackstone's *Commentaries*, Vol. I, p. 135.

<sup>67</sup> "[The assumption of extraordinary risks] was first announced, in all its repulsive nakedness, by the late Lord Bramwell, one of the straitest of the sect of those economic Pharisees whose Gamaliels were such writers as Ricardo and John Stuart Mill." — Labatt's *Employers' Liability*, Vol. I, p. 156.

<sup>68</sup> "A small number of able judges, devoted, from varying motives, to the supposed interests of the wealthy classes, and caring little for any others, boldly invented an exception to the general rule of masters' liability, by which servants were deprived of its protection." — Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Introduction, p. vi.

<sup>69</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 31; Labatt's *Employers' Liability*, Vol. II, p. 1325; *Priestley vs. Fowler*, 3 Meeson and Welsby 1 (England, 1837), Lord Abinger's remarks at p. 6; *Murray vs. South Carolina Railroad Company*, 1 McMullan 385 (South Carolina, 1841), dissenting opinion of Mr. Justice O'Neill at pp. 403, 404; *Farwell vs. Boston*

and Worcester Railroad Corporation, 4 Metcalf 49 (Massachusetts, 1842) ; Schaub *vs.* Hannibal and St. Joseph Railroad Company, 106 Missouri 74, 91 (1891).

<sup>70</sup> See discussion in *Ives vs. South Buffalo Railway Company*, 94 Northeastern 431, 439-441 (New York, 1911).

<sup>71</sup> At primitive Germanic law the visible agent of an injury was liable regardless of intent or care. — Wigmore's *Responsibility for Tortious Acts: Its History* in the *Harvard Law Review*, Vol. VII, pp. 315-357.

Professor Bohlen, in his article on *The Rule in Rylands v. Fletcher* in the *Pennsylvania Law Review*, Vol. 59, pp. 298, 306-310, points out that all the so-called "acts done at peril" were such as would frequently occur in a primitive community and that the rule of absolute liability for these acts is to be regarded as a survival of primitive law.

<sup>72</sup> See below, p. 25.

<sup>73</sup> See *Cooley on Torts*, Third Edition, p. 62.

<sup>74</sup> *Coggs vs. Bernard*, 2 Lord Raymond 909 (England, 1703). Said Lord Holt (at p. 918) "The law charges this person [a common carrier] thus entrusted to carry goods, against all events but acts of God, and of the enemies of the King. . . . And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing. . . . And this is the reason the law is founded upon in that point."

For the common law liability of inn-keepers see *Cooley on Torts*, Third Edition, pp. 1338-1345.

<sup>75</sup> Wigmore's *Responsibility for Tortious Acts: Its History* in the *Harvard Law Review*, Vol. VII, pp. 441-456, especially p. 454.

<sup>76</sup> "The law never implies an obligation in relation to a matter about which the parties are, or may, with proper diligence, be equally informed. . . . The common case of the warranty of the soundness of a horse, notoriously blind, may be put in illustration. The warranty does not extend to the goodness of the eyes, because the

purchaser knew, or might have known, with proper care, that they were defective." — Concurring opinion of Chancellor Johnson in *Murray vs. South Carolina Railway Company*, 1 McMullan 385, 402 (South Carolina, 1841).

<sup>77</sup> "Throughout it is seen that the obligation to do more than afford others the opportunity to protect themselves is anomalous and exceptional." — Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, pp. 15, 16.

<sup>78</sup> *Ilott vs. Wilkes*, 3 Barnewald and Alderson 304 (England, 1820). — One who enters a wood with notice that spring guns have been set therein, though he does not know the precise location of any gun, takes on himself the risk of injury from such guns.

Said Lord Justice Bowen, in *Thomas vs. Quartermaine*, Law Reports, 18 Queen's Bench Division, 685 (England, 1887): "Quite apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person."

<sup>79</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 15.

<sup>80</sup> Pound's *Liberty of Contract* in the *Yale Law Journal*, Vol. XVIII, p. 454.

<sup>81</sup> See below, pp. 64, 65.

<sup>82</sup> "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself". — *Priestley vs. Fowler*, 3 Meeson and Welsby 1 (England, 1837), Lord Abinger's opinion at p. 6.

<sup>83</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, pp. 14-34, 91-115.

<sup>84</sup> Said Blackstone: "The public good is in nothing more essentially interested, than in the protection of every individual's private rights". — *Commentaries on the Laws of England*, Vol. I, p. 135.

*Per contra*, one of the most eminent of modern jurists writes that the end of law is "the securing, under the form of constraint, of the

vital conditions of society." — Ihering's *Der Zweck im Recht*, Vol. I, p. 435. Georg Jellinek defines law as "the sum of conditions necessary for the maintenance of society." — *Die sozial ethische Bedeutung vom Recht, Unrecht, und Straf*, p. 42. And Mr. Alfred P. Thom, in a brief filed for the Federal Employers' Liability Commission, states: "It is and should be a function of legislation, except as forbidden by constitutional restrictions, to modify social relationships and to readjust social burdens in accordance with public necessities, and an enlightened public policy." — *Report of the Employers' Liability and Workmen's Compensation Commission*, Sixty-second Congress, Second Session, Senate Document, No. 338, Vol. II, p. 403.

<sup>85</sup> "If Coke were to come among us . . . he would be thoroughly at home in our constitutional law. There he would see the development and the fruition of his Second Institute. All that might surprise him would be that so much had been taken from and made of his labors with so little recognition of the source." — Pound's *Do We Need a Philosophy of Law?* in the *Columbia Law Review*, Vol. V, p. 342.

<sup>86</sup> "There is at least one field in which the elasticity of the common law and even perhaps of what may be called the common law idea, has proved no match for the strain put upon it by the development of modern life, — a field in which all Europe, including Great Britain, has struck at the roots of a fundamental doctrine both of the civil and the common law, but in which the United States remains virtually at a standstill. This is the field of what is with us still, Employers' Liability for Damages." — Warner's *Employers' Liability as an Industrial Problem* in *The Green Bag*, Vol. XVIII, p. 185.

<sup>87</sup> Compare Labatt's *Employers' Liability*, Preface, pp. viii, ix.

<sup>88</sup> Compare Labatt's *Employers' Liability*, Ch. I.

<sup>89</sup> *Galloway vs. Chicago, Rock Island and Pacific Railway Company*, 87 Iowa 458 (1893) ; *McCaull vs. Bruner*, 91 Iowa 214 (1894) ; *Rusch vs. City of Davenport*, 6 Iowa 443 (1858).

To constitute actionable negligence there must be a breach of duty imposed by law. — *Dillon vs. Iowa Central Railway Company*, 118

Iowa 645 (1902); *Boston Insurance Company vs. Chicago, Rock Island and Pacific Railway Company*, 118 Iowa 423 (1902).

<sup>90</sup> The master "is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief." — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 6 (England, 1837).

<sup>91</sup> *Forbes vs. Boone Valley Coal and Railway Company*, 113 Iowa 94, 99 (1901); *Taylor vs. Star Coal Company*, 110 Iowa 40, 48 (1899); *Fink vs. Des Moines Ice Company*, 84 Iowa 321, 324 (1892); see *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724, 731 (1906), where various statements of the master's duty are discussed.

<sup>92</sup> *Treka vs. Burlington, Cedar Rapids and Northern Railway Company*, 100 Iowa 205, 208 (1896); *Forbes vs. Boone Valley Coal and Railway Company*, 113 Iowa 94, 99 (1901); *Young vs. Burlington Wire Mattress Company*, 79 Iowa 415, 417 (1890).

<sup>93</sup> *Fitter vs. Iowa Telephone Company*, 143 Iowa 689, 692 (1909); *Way vs. Chicago and Northwestern Railway Company*, 76 Iowa 393 (1888); *Hathaway vs. Illinois Central Railway Company*, 92 Iowa 337, 340 (1894); *Luisi vs. Chicago Great Western Railway Company*, 136 Northwestern 322 (1912).

<sup>94</sup> *Hamm vs. Bettendorf Axle Company*, 147 Iowa 681, 687 (1910); *Cooper vs. Central Railroad of Iowa*, 44 Iowa 134, 136 (1876); *Hunter vs. North Iowa Brick and Tile Company*, 136 Northwestern 515, 517, 518 (Iowa, 1912).

<sup>95</sup> *Beardsley vs. Murray Iron Works*, 129 Iowa 675 (1906). Inexperienced employees should have been told how they might safely roll a heavy wheel.

*Hazlerigg vs. Dobbins*, 145 Iowa 495, 499 (1909). A boy of fourteen should have been instructed to avoid dangling his feet while riding on the sweep of a horsepower.

But the master is not bound to instruct an experienced employee. — *Hanson vs. Hammell*, 107 Iowa 171, 176 (1898).

<sup>96</sup> *Hendrickson vs. United States Gypsum Company*, 133 Iowa 89,



90 (1907). It is the duty of a mine operator to warn employees of an expected explosion in blasting.

Sidwell *vs.* Economy Coal Company, 130 Northwestern 729 (Iowa, 1911). An inexperienced miner should have been warned of the danger from falls of roof.

“The duty of the master to instruct and warn a servant only arises as to dangers which the master knows or has reason to believe the servant is ignorant of.” Hence a mine operator was not required to warn an experienced youth as to the danger of entering the cage while the engineer was working the water out of the cylinders, preparatory to starting. — Mericle *vs.* Aeme Cement Plaster Company, 136 Northwestern 916, 919 (Iowa, 1912).

<sup>97</sup> “Care in furnishing a safe place at the beginning of the employment must be followed by reasonable supervision, inspection, and care to keep it safe until the relation of master and servant is at an end.” — Winslow *vs.* Commercial Building Company, 147 Iowa 238, 241, 242 (1910).

“It will not do to say that, having furnished suitable and proper machinery and appliances, the [railway] corporation can thereafter remain passive. The duty of inspection is affirmative and must be continuously fulfilled, and positively performed.” — Brann *vs.* Chicago, Rock Island and Pacific Railway Company, 53 Iowa 595, 597 (1880).

Inspection by a public authority does not relieve the employer of his own duty in discovering and repairing defects, and the failure of an official inspector to discover a defect in a particular appliance which he is not shown to have inspected, is not proof of the absence of such defect. — Brusseau *vs.* Lower Brick Company, 133 Iowa 245, 247 (1907).

On duty of inspection see also: Morris *vs.* Excelsior Coal Company, 95 Iowa 639, 640 (1895); Shebeck *vs.* National Cracker Company, 120 Iowa 414, 417 (1903); Hamm *vs.* Bettendorf Axle Company, 147 Iowa 681, 687 (1910); Barto *vs.* Iowa Telephone Company, 126 Iowa 241, 244 (1904); Mosgrove *vs.* Zimbleman Coal Company, 110 Iowa 169, 172 (1899).

<sup>98</sup> Lanza *vs.* LeGrand Quarry Company, 115 Iowa 299, 302 (1902).

<sup>99</sup> "The place in which an employee is directed to work is 'safe,' within the meaning of the law, 'when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employee while he is himself exercising reasonable care in the service which he undertakes to perform.' " — *Peterson vs. Chicago, Rock Island and Pacific Railway Company*, 149 Iowa 496, 498 (1910). See also, *Hunt vs. Chicago and Northwestern Railroad Company*, 26 Iowa 363, 369 (1868); *Brusseau vs. Lower Brick Company*, 133 Iowa 245, 249 (1907).

<sup>100</sup> "Reasonable care", *Greenleaf vs. Illinois Central Railroad Company*, 29 Iowa 14, 42 (1870); "ordinary and all reasonable care and supervision", *McKee vs. Chicago, Rock Island and Pacific Railway Company*, 83 Iowa 616, 619 (1891); "all reasonable precaution", *Cooper vs. Central Railroad of Iowa*, 44 Iowa 134, 136 (1876).

<sup>101</sup> In *Gould vs. Schermer*, 101 Iowa 582, 591 (1897), ordinary care is defined as "the conduct of an ideal average prudent man."

For other definitions see *Galloway vs. Chicago, Rock Island and Pacific Railway Company*, 87 Iowa 458, 468 (1893); *Corson vs. Coal Hill Coal Company*, 101 Iowa 224 (1897); *McCaull vs. Bruner*, 91 Iowa 214 (1894); *Rusch vs. City of Davenport*, 6 Iowa 443 (1858).

<sup>102</sup> *Murphy vs. Chicago, Rock Island and Pacific Railway Company*, 38 Iowa 539, 543 (1874).

<sup>103</sup> *Brann vs. Chicago, Rock Island and Pacific Railway Company*, 53 Iowa 595, 597 (1880); *Stockwell vs. Chicago and Northwestern Railway Company*, 106 Iowa 63 (1898).

<sup>104</sup> *Brown vs. West Riverside Coal Company*, 143 Iowa 662, 668 (1909).

<sup>105</sup> *Scott vs. Iowa Telephone Company*, 126 Iowa 524 (1905); *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906).

<sup>106</sup> *Meloy vs. Chicago and Northwestern Railway Company*, 77 Iowa 743 (1889).

<sup>107</sup> *Magee vs. Chicago and Northwestern Railway Company*, 82 Iowa 249 (1891).

<sup>108</sup> *Brownfield vs. Chicago, Rock Island and Pacific Railway Company*, 107 Iowa 254 (1899).

<sup>109</sup> *Cushman vs. Carbondale Fuel Company*, 116 Iowa 618 (1902); *Blazenic vs. Iowa and Wisconsin Coal Company*, 102 Iowa 706 (1897).

<sup>110</sup> *Forbes vs. Boone Valley Coal and Railway Company*, 113 Iowa 94 (1901); *Young vs. Burlington Wire Mattress Company*, 79 Iowa 415 (1890).

<sup>111</sup> *Burns vs. Chicago, Milwaukee and St. Paul Railway Company*, 69 Iowa 450 (1886).

<sup>112</sup> *Bryce vs. Burlington, Cedar Rapids and Northern Railway Company*, 119 Iowa 274 (1903).

<sup>113</sup> *Young vs. Burlington Wire Mattress Company*, 79 Iowa 415 (1890). — Failure to cover knives of tenon-machine.

<sup>114</sup> *Hall vs. Chicago, Rock Island and Pacific Railway Company*, 116 Northwestern 113 (Iowa, 1908); *Cooper vs. Central Railroad of Iowa*, 44 Iowa 134 (1876).

<sup>115</sup> *Kirby vs. Chicago, Rock Island and Pacific Railway Company*, 129 Northwestern 963 (Iowa, 1911).

But where a safety appliance is in common use a jury may find that the master is negligent in not adopting it or some other appliance equally safe. — *Harney vs. Chicago, Rock Island and Pacific Railway Company*, 115 Northwestern 886 (Iowa, 1908).

<sup>116</sup> *Hamilton vs. Des Moines Valley Railroad Company*, 36 Iowa 31 (1872); *Allen vs. Burlington, Cedar Rapids and Northern Railway Company*, 64 Iowa 94 (1884); *Hosie vs. Chicago, Rock Island and Pacific Railway Company*, 75 Iowa 683 (1888); *Kirby vs. Chicago, Rock Island and Pacific Railway Company*, 129 Northwestern 963 (Iowa, 1911).

<sup>117</sup> *O'Connell vs. Smith*, 141 Iowa 1, 3 (1909); *Austin vs. Chicago, Rock Island and Pacific Railway*, 93 Iowa 236 (1895).

<sup>118</sup> *Ives vs. Welden*, 114 Iowa 476 (1901); *Messenger vs. Pate*, 42 Iowa 443 (1876); *Pike vs. Cedar Rapids and Marion Railway Company*, 131 Northwestern 50 (Iowa, 1911).

<sup>119</sup> *Chicago, Milwaukee and St. Paul Railway Company vs. Voelker*, 129 Federal Reports 522 (1904).

<sup>120</sup> *Pike vs. Cedar Rapids and Marion Railway Company*, 131 Northwestern 50 (Iowa, 1911).

<sup>121</sup> *Galloway vs. Agar Packing Company*, 129 Iowa 1 (1905); *O'Connell vs. Smith*, 141 Iowa 1, 3 (1909); *Stephenson vs. Sheffield Brick and Tile Company*, 130 Northwestern 586, 588 (Iowa, 1911); *Verlin vs. United States Gypsum Company*, 135 Northwestern 402, 403 (Iowa, 1912).

<sup>122</sup> *McCreery vs. Union Roofing & Manufacturing Company*, 143 Iowa 303, 306 (1909).

<sup>123</sup> *Mosgrove vs. Zimbleman Coal Company*, 110 Iowa 169 (1899).

<sup>124</sup> *Tobey vs. Burlington, Cedar Rapids and Northern Railway Company*, 94 Iowa 256 (1895).

<sup>125</sup> *Baker vs. Chicago, Rock Island and Pacific Railway Company*, 95 Iowa 163 (1895). A section hand, walking home on the track after his day's work, is not within the line of his duty and is to be treated as a trespasser, notwithstanding he had been told by his foreman to notice the condition of the track whenever he should pass over it.

<sup>126</sup> Where a "clinker man", employed in a round house, was injured while aiding in shifting certain round house tracks, a work which he had done for years, with the knowledge of other employees of the defendant, the defendant could not escape liability on the ground that the plaintiff was out of the line of his duty, and acting as a mere volunteer. — *Butler vs. Chicago, Burlington and Quincy Railway Company*, 87 Iowa 206 (1893).

<sup>127</sup> *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093 (Iowa, 1910).

<sup>128</sup> *Newbury vs. Getchell & Martin Manufacturing Company*, 100 Iowa 441 (1896). A minor was set at work more dangerous than that for which he was employed. See also *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093 (Iowa, 1910), for a case in which a foreman ordered plaintiff to pour powder into a newly "sprung" hole.

<sup>129</sup> *Handelun vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 Iowa 709 (1887).

<sup>130</sup> *Liming vs. Illinois Central Railway Company*, 81 Iowa 246 (1890).

<sup>131</sup> *Watson vs. Dilts*, 116 Iowa 249, 252 (1902).

<sup>132</sup> *McKee vs. Chicago, Rock Island and Pacific Railway Company*, 83 Iowa 616, 618 (1891), where it was held that the railway company was not bound to anticipate that a brakeman might be on the side ladder of a box-car, and leaning out, while the train passed an ordinary road crossing, hence was not negligent in placing a wing-fence at such crossing too near the track to be cleared by one in such position.

<sup>133</sup> *Doyle vs. Chicago, St. Paul and Kansas City Railway Company*, 77 Iowa 607 (1889). A loose coupling-pin, hurled from the bumper of a car on a passing train, struck and disabled a bridgeman rightfully standing near the track. *Held* that the company was liable because, although this particular accident could not have been foreseen, yet the presence of the loose pin was a negligent act from which *some* injury might reasonably have been anticipated.

See also Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Sec. 30.

<sup>134</sup> *Gould vs. Schermer*, 101 Iowa 582 (1897); *Madden vs. Saylor Coal Company*, 133 Iowa 699 (1907).

<sup>135</sup> *Brown vs. West Riverside Coal Company*, 143 Iowa 662, 671 (1909). Defendant's negligent storing of powder concurred with a stroke of lightning to produce explosion which killed plaintiff intestate. See also *Green-Wheeler Shoe Company vs. Chicago, Rock Island and Pacific Railway Company*, 130 Iowa 123 (1906). Defendant's delay in shipping goods concurred with flood to damage property.

*Vyce vs. Chicago, Burlington and Quincy Railway Company*, 126 Iowa 90 (1904). Plaintiff's land was flooded by back water from insufficient bridge.

<sup>136</sup> *Baird vs. Morford*, 29 Iowa 531 (1870).



<sup>137</sup> *Keist vs. Chicago and Great Western Railway Company*, 110 Iowa 32 (1899).

<sup>138</sup> *Pierson vs. Chicago and Northwestern Railway Company*, 127 Iowa 13 (1905) ; *Keist vs. Chicago and Great Western Railway Company*, 110 Iowa 32 (1899).

<sup>139</sup> An estimate of the Imperial Insurance Office of Germany attributes 39.83% of 81,248 accident cases to general hazard of the industry and to chance, act of God, etc. — *Bulletin of the United States Bureau of Labor*, No. 92, Table 12, pp. 64, 65.

The Minnesota Bureau of Labor estimates that 56% of industrial accidents are due to the hazards of industry. — *Twelfth Biennial Report of the Bureau of Labor, Minnesota*, p. 188. The Wisconsin Bureau of Labor gives an estimate of 52.1% as due to the hazards of industry. — *Bureau of Labor and Statistics, Wisconsin, 1907-1908*, p. 4.

The exact percentage largely depends on the arbitrary choice of the compiler. Very many accidents attributed by the German authorities, e. g., to the "fault" of the employer or of workmen are really due to the shortcomings of average human nature (see below, p. 52). Such accidents might have been prevented if employers and workmen were other than they are. Human nature being, unfortunately, what it is, these accidents were as inevitable as any other and ought, in reason, to be charged to the general hazard of industry.

<sup>140</sup> "The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly." — Chief Justice Shaw's opinion in *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 57 (Massachusetts, 1842).

The learned chief justice did not say where or how this "general rule" originated, nor did he cite any authority in support of his proposition. Mr. Justice Evans, equally without citation of authorities, said, in *Murray vs. South Carolina Railroad Company*, 1 McMullan 385, 401 (South Carolina, 1841), "It is admitted he

takes upon himself the ordinary risks of his vocation; why not the extraordinary ones?"

See also *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860); *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906).

<sup>141</sup> *Martin vs. Chicago, Rock Island and Pacific Railroad Company*, 118 Iowa 148 (1902); *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906).

<sup>142</sup> Bohlen's *The Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 31, footnote.

<sup>143</sup> Warner's *Employers' Liability as an Industrial Problem* in *The Green Bag*, Vol. XVIII, p. 187.

<sup>144</sup> See above, Ch. II.

<sup>145</sup> "When the employer, or those representing him has provided a place which is reasonably safe in itself, and has furnished reasonably safe tools and appliances and reasonably competent fellow workmen, then the risk incident to the progress of the work as carried on by the employees is assumed by virtue of the employment, and for an injury received in the prosecution of the work in such place with such appliances and in connection with such fellow workmen, the employe cannot recover from the employer." — *McQueeney vs. Chicago, Milwaukee and St. Paul Railway Company*, 120 Iowa 522 (1903). See also *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724, 735 (1906).

<sup>146</sup> See above, p. 15.

<sup>147</sup> *Kerns vs. Chicago, Milwaukee and St. Paul Railway Company*, 94 Iowa 121 (1895).

<sup>148</sup> *Connors vs. Burlington, Cedar Rapids and Northern Railway Company*, 74 Iowa 383 (1888).

<sup>149</sup> "Every person, in undertaking to work, assumes the risks ordinarily incident to his employment; that is, he agrees to labor in the situation and with the tools provided in so far as the condition of these are apparent or may be ascertained by the exercise of ordinary diligence and care." — *Wilder vs. Great Western Cereal Company*, 130 Iowa 263, 269 (1906).

<sup>150</sup> *Olson vs. Hanford Produce Company*, 118 Iowa 55 (1902).

<sup>151</sup> *Wilder vs. Great Western Cereal Company*, 130 Iowa 263 (1906).

<sup>152</sup> *Patton vs. Central Iowa Railway Company*, 73 Iowa 306 (1887). Trainmen assume the risks that cattle will stray onto an unfenced right of way.

<sup>153</sup> *Dowell vs. Burlington, Cedar Rapids and Northern Railway Company*, 62 Iowa 629 (1883). The additional risks from snow and ice and from its removal by snow plows are among those necessarily attendant upon the operation of railroads and are assumed by railway trainmen.

<sup>154</sup> "All risks which are naturally or necessarily incident to the service". — *Sankey vs. Chicago, Rock Island and Pacific Railway Company*, 118 Iowa 39, 45 (1902).

<sup>155</sup> *Duree vs. Chicago, Milwaukee and St. Paul Railway Company*, 118 Iowa 640 (1902).

<sup>156</sup> *Wahlquist vs. Maple Grove Coal and Mining Company*, 116 Iowa 720 (1902).

<sup>157</sup> *Oleson vs. Maple Grove Coal and Mining Company*, 115 Iowa 74 (1901).

<sup>158</sup> *Nugent vs. Cudahy Packing Company*, 126 Iowa 517 (1905).

<sup>159</sup> *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906); *Bruns vs. North Iowa Brick Company*, 130 Northwestern 1083, 1084 (Iowa, 1911).

<sup>160</sup> *Stomne vs. Hanford Produce Company*, 108 Iowa 137 (1899); *Wilder vs. Great Western Cereal Company*, 130 Iowa 263 (1906).

<sup>161</sup> *Mayes vs. Chicago, Rock Island and Pacific Railway Company*, 63 Iowa 562 (1884).

<sup>162</sup> *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906); *McQueeney vs. Chicago, Milwaukee and St. Paul Railway Company*, 120 Iowa 522 (1903).

<sup>163</sup> *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906); *Duffey vs. Consolidated Block Coal Company*, 147 Iowa

225, 228 (1910); *Beresford vs. American Coal Company*, 124 Iowa 34 (1904).

<sup>104</sup> *Respondeat superior* appears to have originated in the days of bond-servants for whose tortious acts the liability of the master afforded the only efficient remedy. — Kent's *Commentaries on American Law*, Twelfth Edition, p. 260, note 1; O. W. Holmes's *The Arrangement of the Law in American Law Review*, Vol. VII, pp. 46, 61, 62.

<sup>105</sup> The "scope of employment" test of master's liability was evolved under Lord Kenyon, near the beginning of the nineteenth century. — See *Ellis vs. Turner*, 8 Term Reports 531 (England, 1800); *M'Manus vs. Crickett*, 1 East 107 (England, 1800) and Wigmore's *Responsibility for Tortious Acts: Its History in the Harvard Law Review*, Vol. VII, pp. 399, ff.

In the eighteenth century the master's liability was grounded on the fiction of "implied command or consent". — Blackstone's *Commentaries on the Laws of England*, Vol. I, p. 417; and Professor Wigmore's article in the *Harvard Law Review*, Vol. VII, pp. 392, ff.

At primitive Germanic law, and in England so late even as the twelfth century, the master was responsible for every tort committed by a member of his household. — Wigmore's *Responsibility for Tortious Acts: Its History in the Harvard Law Review*, Vol. VII, pp. 399, ff.

<sup>106</sup> Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Sec. 141; *Cooley on Torts*, Third Edition, p. 1016.

<sup>107</sup> "I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please; and the reason that I am liable is this; that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." — Opinion of Lord Brougham, in House of Lords, *Duncan vs. Findlater*, 6 Clark and Fennelly 894, 910 (England, 1839).

"[The master] is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business." — Opinion

of Lord Cranworth in *Bartonshill Coal Company vs. Reid*, 3 Macqueen, House of Lords, 266, 283 (England, 1858).

"I am answerable for the wrongs of my servant or agent, not because he is authorized by me, or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others." — *Pollock on Torts*, First Edition, p. 68.

<sup>168</sup> Shearman and Redfield's *The Law of Negligence*, Fifth Edition, p. 219.

<sup>169</sup> Said Baron Bramwell, in *Collett vs. Foster*, 2 Hurlstone and Norman 356, 361 (England, 1857): "I have a great desire in all cases to make the actual wrong doer alone responsible, and to limit the doctrine of '*respondeat superior*.' "

Said the Supreme Court of Louisiana, in *Shea vs. Reems*, 36 Louisiana Annual Reports 966, 969 (1884): "We never apply this rule [*respondeat superior*] without a sense of its hardship on the master".

Similar expressions of judicial feeling were not uncommon in the third quarter of the last century. See *Hays vs. Millar*, 77 Pennsylvania State Reports 238, 242 (1874); *Smith vs. Keal*, Law Reports, 9 Queen's Bench Division, 340 (England, 1882), remarks of Manisty, J., at p. 344.

<sup>170</sup> Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 31, and note No. 228 below.

<sup>171</sup> Shearman and Redfield's *The Law of Negligence*, Introduction, p. vi.

<sup>172</sup> *Priestley vs. Fowler*, 3 Meeson and Welsby 1 (England, 1837), remarks of Chief Baron Abinger at pp. 6 and 7.

<sup>173</sup> *Murray vs. South Carolina Railroad Company*, 1 McMullan 385 (South Carolina, 1841). The decision was by a divided court.

Chancellor Johnson remarked (pp. 401, 402): "The foundation of all legal liability, is the omission to do some act which the law commands, the commission of some act which the law prohibits, or the violation of some contract. . . . There is no law regulating the relative duties of the owners of a steam car, and the persons employed by them to conduct it. The liability, if any attaches,



must therefore arise out of the contract. . . . The plaintiff, in consideration that the defendants would pay him so much money, undertook to perform the service of fireman. . . . This is all that is expressed. Is there anything more implied? . . . . The law never implies an obligation in relation to a matter about which the parties are or may, with proper diligence, be equally informed. . . . With proper diligence and prudence, he [the plaintiff] might have been as well, and it does not follow that he might not have been better, informed than the defendants about the fitness and security of all the appointments connected with the train. If he was not, it was his own want of prudence, for which defendants are not responsible. If he was, he will be presumed to have undertaken to meet all the perils incident to the employment. . . .

There is not the least analogy between this case and that of common carriers of goods . . . . [instanced in Judge O'Neill's dissenting opinion.] They are liable in respect to the price paid. . . . The plaintiff paid nothing for his transportation; on the contrary, he was to be paid for his labor, and for the perils to which he was exposed, as incident to his employment."

Judge Evans (pp. 400, 401) was of opinion that the contract of employment did not bind the company to guarantee one employee against the negligence of another and could "see no reason for adding this to the already known and acknowledged liability of a carrier, without a single case or precedent to sustain it." He suggested that there was a "joint undertaking, wherein the employees were not responsible to the company for the conduct of each other, and the company was not liable to one for the misconduct of another."

Neither Evans nor Johnson argued the question of *respondet superior* which, apparently, should have controlled the decision. Judge O'Neill filed a vigorous dissenting opinion (p. 403) which anticipates many of the later criticisms of the fellow-servant rule.

<sup>174</sup> For the cases see Shearman and Redfield's *The Law of Negligence*, Fifth Edition, Sec. 180. In *Priestley vs. Fowler*, 3 Meeson and Welsby 1 (England, 1837) Lord Abinger, at pp. 5 and 6, suggested the doctrine of co-service though his decision need not have turned upon it. The fellow-servant rule, as a corollary of the servant's assumption of risk, was first explicitly laid down in *Murray*

*vs. South Carolina Railroad Company*, 1 McMullan 385 (South Carolina, 1841). The alleged reasons for the rule were cogently set forth, and, indeed, largely invented, by Chief Justice Shaw in *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49 (Massachusetts, 1842). The doctrine was cited in New York in 1844, in *Brown vs. Maxwell* 6 Hill 592, and was adopted without argument in *Coon vs. Utica and Syracuse Railroad Company*, 6 Barbour 231 (New York, 1849). The precise point was settled in England in 1850 by *Hutchinson vs. York, Newcastle and Berwick Railway Company*, 5 Exchequer 343. Co-service was established in Pennsylvania in 1854, in *Ryan vs. Cumberland Valley Railroad Company*, 23 Pennsylvania State 384; in Ohio in 1854, in *Cleveland, Columbus & Cincinnati Railroad Company vs. Keary*, 3 Ohio 204; and in Iowa in 1860 by *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421. The doctrine was forced upon Scotch law by the decision of the House of Lords in *Bartonshill Coal Company vs. Reid*, 3 Macqueen, House of Lords, 266 (1858), reversing the unanimous opinion of the fifteen judges of Scotland.

<sup>175</sup> "We do not, however, mean to discuss the reasons for the principle stated. Its wisdom has been recognized and sustained by luminous arguments in Massachusetts, South Carolina, New York, Pennsylvania, Georgia and Illinois, while in other States it is approved with certain limitations and restrictions." — *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860).

<sup>176</sup> *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 423 (1860). Other statements are:

"The principal is not liable to one agent or servant for the injury which he may have sustained in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business or employment." — *Coon vs. Utica and Syracuse Railroad Company*, 6 Barbour 231, 237 (New York, 1849).

"Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by an action against the actual wrongdoer." — *Ryan vs. Cumberland Valley Railway Company*, 23 Pennsylvania 384, 387 (1854).

<sup>177</sup> Such, substantially, was the effect of the decision of the House of Lords in *Wilson vs. Merry*, Law Reports, 1 House of Lords, 326 (England, 1868), by which the doctrine of vice principalship was overruled.

<sup>178</sup> *Fink vs. Des Moines Ice Company*, 84 Iowa 321, 325 (1892).

<sup>179</sup> "The duty of the master to provide the servant a reasonably safe place to work is absolute and non-delegable. The obligation cannot be shifted from the master to a fellow servant or to any other third person." — *Winslow vs. Commercial Building Company*, 147 Iowa 238, 241 (1910); see also, *Haworth vs. Seevers Manufacturing Company*, 87 Iowa 765, 774 (1892); *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1106 (1910); *Owens vs. Norwood-White Coal Company*, 133 Northwestern 716, 721 (Iowa, 1911).

<sup>180</sup> *Beresford vs. American Coal Company*, 124 Iowa 34, 40 (1904).

<sup>181</sup> *Brann vs. Chicago, Rock Island and Pacific Railway Company*, 53 Iowa 595, 597 (1880). A brakeman and a car inspector were not co-employees in respect of the latter's failure to discover a defective hand-hold on a freight car, inspection of appliances being a non-delegable duty of the employer.

<sup>182</sup> *Beresford vs. American Coal Company*, 124 Iowa 34, 40 (1904); *Cabbage vs. Youngerman*, 134 Northwestern 1074 (Iowa, 1912).

<sup>183</sup> *Hendrickson vs. United States Gypsum Company*, 133 Iowa 89, 93 (1907); *Hamm vs. Bettendorf Axle Company*, 147 Iowa 681, 693 (1910).

When the prosecution of the work in which an employee is engaged involves the use of dangerous explosives, the duty of giving adequate and timely warning cannot be delegated so as to relieve the master of responsibility for the actual giving of such warning. — *Neal vs. Sheffield Brick and Tile Company*, 151 Iowa 690, 694 (1911).

<sup>184</sup> *Schminkey vs. Sinclair & Company*, 114 Northwestern 612 (1908); *Fredericks vs. Fort Dodge Brick and Tile Company*, 131 Northwestern 766, 768 (1911).

<sup>185</sup> See an enumeration of non-delegable duties in *Beresford vs. American Coal Company*, 124 Iowa 34, 42 (1904).

<sup>186</sup> *Blazenic vs. Iowa and Wisconsin Coal Company*, 102 Iowa 706, 711 (1897).

<sup>187</sup> In *Winslow vs. Commercial Building Company*, 147 Iowa 238 (1910), the owner of a building was held liable to an employee injured through the faulty construction of a fire escape which had been erected by an independent contractor. Said Mr. Justice Weaver, speaking for the court: "In the case of an independent contractor, he is himself the employer and has his own servants who look to him for the safety of their place of work, and he alone is liable to his servant or other person who is injured *in the execution of his contract*. . . . But, when the contract was performed and the completed work accepted by the defendant, the relation of owner and independent contractor was dissolved, and thereafter could in no manner affect the obligation of such owner as an employer of labor in and about the structure thus erected" (241, 242).

<sup>188</sup> *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860).

<sup>189</sup> *Hoben vs. Burlington and Missouri River Railroad Company*, 20 Iowa 562 (1866).

<sup>190</sup> *Beresford vs. American Coal Company*, 124 Iowa 34 (1904).

<sup>191</sup> *Peterson vs. Whitebreast Coal and Mining Company*, 50 Iowa 673 (1879); *Hathaway vs. City of Des Moines*, 97 Iowa 333 (1896); *Foley vs. Chicago, Rock Island and Pacific Railway Company*, 64 Iowa 644 (1884).

<sup>192</sup> *Hathaway vs. City of Des Moines*, 97 Iowa 333 (1896); compare *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093 (Iowa, 1910).

<sup>193</sup> *Baldwin vs. St. Louis, Keokuk and Northwestern Railway Company*, 75 Iowa 297 (1888); *Foley vs. Chicago, Rock Island and Pacific Railway Company*, 64 Iowa 644 (1884). In *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093, (1910), Mr. Justice Ladd remarked (p. 1095) of the foreman: "He

was superintendent of the work in excavating and removing the embankment. He hired and discharged employes engaged thereat, and, though he sometimes operated the crane to which the shovel was attached and at others acted as engineer, he at all times exercised entire control. Manifestly he was vice principal with reference to the work being done''. But see other extracts from the same opinion in note 210.

Where a superior is invested with the charge of a particular piece of work, though not of a department, with full power to employ and discharge men working therein, then he is to be regarded as a vice-principal. — *Baldwin vs. St. Louis, Keokuk and Northwestern Railway Company*, 75 Iowa 297 (1885).

<sup>194</sup> *Hamm vs. Bettendorf Axle Company*, 147 Iowa 681, 693 (1910).

<sup>195</sup> *Blazenie vs. Iowa and Wisconsin Coal Company*, 102 Iowa 706 (1897); *Beresford vs. American Coal Company*, 124 Iowa 34 (1904); *McQueeney vs. Chicago, Milwaukee and St. Paul Railway Company*, 120 Iowa 522 (1903); *Vohs vs. Shorthill*, 130 Iowa 538 (1906).

<sup>196</sup> *Newbury vs. Getchel and Martin Company*, 100 Iowa 441 (1896); *McQueeney vs. Chicago, Milwaukee and St. Paul Railway Company*, 120 Iowa 522 (1903); *Collingwood vs. Illinois and Iowa Fuel Company*, 125 Iowa 537 (1904); and *Vohs vs. Shorthill*, 130 Iowa 538 (1906).

In *Forney vs. Mardis Company*, 136 Northwestern 895 (Iowa, 1912), the Court, through Mr. Justice Sherwin, remarked (at p. 896): "But if an injury has resulted from the negligent performance of an act, which it was no part of the duty of the master to perform, and in the doing of which no duty of the master was being performed, then the person through whose negligence the injury has resulted, whatever may be his authority, is not, as to that act, the representative of the master, and the master is not liable therefor."

<sup>197</sup> Labatt in his *Employer's Liability*, Vol. II, p. 1588, regarded the question as still unsettled in 1902. But the statement in the text appears to be justified by the decisions in *Beresford vs. American Coal and Fuel Company*, 124 Iowa 34 (1904); *Collingwood vs. Illi-*



nois and Iowa Fuel Company, 125 Iowa 537 (1904) ; *Vohs vs. Short-hill*, 130 Iowa 538 (1906) ; *Hamm vs. Bettendorf Axle Company*, 147 Iowa 681 (1910) ; *Peterson vs. Chicago, Rock Island and Pacific Railway Company*, 149 Iowa 496 (1910) ; *Forney vs. Mardis Company*, 136 Northwestern 895 (Iowa, 1912).

<sup>198</sup> *Peterson vs. Whitebreast Coal and Mining Company*, 50 Iowa 673 (1879) ; *Hathaway vs. Illinois Central Railway Company*, 92 Iowa 337 (1894).

<sup>199</sup> *Peterson vs. Whitebreast Coal and Mining Company*, 50 Iowa 673 (1879) ; *Baldwin vs. St. Louis, Keokuk and Northern Railway Company*, 68 Iowa 37, 41-43 (1885).

<sup>200</sup> *Foley vs. Chicago, Rock Island and Pacific Railway Company*, 64 Iowa 644 (1884).

<sup>201</sup> *Benn vs. Null*, 65 Iowa 407 (1884).

<sup>202</sup> *Hathaway vs. Illinois Central Railway Company*, 92 Iowa 337 (1894).

<sup>203</sup> *Hoben vs. Burlington and Missouri River Railroad Company*, 20 Iowa 562 (1866).

<sup>204</sup> *Beresford vs. American Coal Company*, 124 Iowa 34 (1904) ; *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1106 (Iowa, 1910).

<sup>205</sup> *Collingwood vs. Illinois and Iowa Fuel Company*, 125 Iowa 537 (1904).

<sup>206</sup> *Baldwin vs. St. Louis, Keokuk and Northern Railway Company*, 68 Iowa 37 (1885).

<sup>207</sup> *Cooper vs. Central Railroad of Iowa*, 44 Iowa 134 (1876).

<sup>208</sup> *Struble vs. Burlington, Cedar Rapids and Northern Railway Company*, 128 Iowa 158 (1905).

<sup>209</sup> *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1106 (Iowa, 1910). The pit "boss in immediate charge and control of the men and of the work as well as of the place is the one to whom they naturally and properly look as the representative of the corporation". Accordingly, it was held that the company was bound by the promise of the mine foreman to repair a defective cage hood.

A person exercising the duties delegated to him by the master in his absence is a temporary vice principal, and notice of defects to either is notice to the master. — *Baldwin vs. St. Louis, Keokuk and Northwestern Railway Company*, 75 Iowa 297, 299, 300 (1888).

<sup>210</sup> *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093 (Iowa, 1910). Plaintiff had, under the instructions of the general foreman, poured powder into a hole that had recently been “sprung” and was injured by the resultant explosion. The court, through Mr. Justice Ladd, remarked: “Nesmith [the foreman] knew that the hole had just been sprung, and, as representative of the defendant, was charged with knowledge of the dangers, latent as well as patent, ordinarily accompanying the business which was being done. . . . As the order in effect assigned the plaintiff a dangerous place at which to work, it was masterial in character, and not merely that of a fellow servant. . . . Not every direction with reference to the progress of the work even when given by a superior servant is to be regarded as coming from the master. . . . But where the effect of the peremptory order of a person in complete control . . . is to place the employé in a place of great peril in which to perform his duties, the decisions are conclusive that the principal will be held responsible for the act as nondelegable” (p. 1095).

<sup>211</sup> *Frandsen vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 372 (1873). Section hand remained on hand car by order of the foreman, though he knew that a passenger train for which the section crew were to yield the track was overdue.

*Strong vs. Iowa Central Railway Company*, 94 Iowa 380 (1895). Brakeman stood on the locomotive pilot to make a coupling by the order of the engineer.

<sup>212</sup> Such, evidently, is the significance attached to this power in the recent case of *Hardy vs. Chicago, Rock Island and Pacific Railway Company*, 127 Northwestern 1093 (Iowa, 1910). Compare the passages quoted in note 210.

<sup>213</sup> *Donaldson vs. Mississippi and Missouri Railroad Company*, 18 Iowa 280, 286 (1865). Plaintiff, a sub-contractor, while loading timbers on defendant's cars, was injured by the negligence of trainmen. The court, in upholding his right to recover, remarked:

“His duties were so entirely in another department, and wholly disconnected with operating the road, as that his relation to the employees managing the train which ran over him cannot be, in any proper sense, said to be that of a co-servant.”

The fact seems to be that the plaintiff in this case was not properly an employee at all, his rights being rather those of a stranger.

<sup>214</sup> *Brann vs. Chicago, Rock Island and Pacific Railway Company*, 53 Iowa 595 (1880). A brakeman was held not to be co-servant of a car inspector through whose negligence he was injured. Said the court (p. 597): “The brakemen on freight trains and such inspector cannot be regarded as co-employees, in such sense as to prevent the former from recovering of the corporation because of the negligence of the latter.”

But the real ground of this rule is rather the doctrine of non-delegable duties than the departmental doctrine. See note 181.

<sup>215</sup> *Theleman vs. Moeller*, 73 Iowa 108, 109 (1887). “This [fellow-servant] rule does not extend to an employee who is charged with no other duty than to inspect the machinery, in the operation of which the injury occurs.” But this *dictum* appears to be only another way of stating that the master’s duty of inspection is non-delegable. In the instant case it was held that a saw operator and an engineer whose duties included inspection and repair of the saw as well as the operation of the engine were co-employees.

<sup>216</sup> *Pyne vs. Chicago, Burlington and Quincy Railway Company*, 54 Iowa 223, 225 (1880). The court remarked that “the fact that one [employee] was a detective and the other a trainman . . . can make no difference in the rights of the parties.”

So in *Treka vs. Burlington, Cedar Rapids and Northern Railway Company*, 100 Iowa 205, 207 (1896), the court held that the fact that one of the servants is not subject to the immediate supervision of the foreman who has control of the other is immaterial in determining whether such servants are fellow-servants.

<sup>217</sup> *Treka vs. Burlington, Cedar Rapids and Northern Railway Company*, 100 Iowa 205 (1896). In *Kimmerle vs. Dubuque Altar Manufacturing Company*, 134 Northwestern 434, 435 (Iowa, 1912) it was held that the operative of a “shaping” machine and a “gluer” who put together pieces of wood to be used on the machine

were co-servants in such sense that their common employer was not answerable to the former for the negligence of the latter.

<sup>218</sup> *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860).

<sup>219</sup> *Manning vs. Burlington, Cedar Rapids and Northern Railway Company*, 64 Iowa 240 (1884).

<sup>220</sup> *Troughear vs. Lower Vein Coal Company*, 62 Iowa 576 (1883).

<sup>221</sup> *Pyne vs. Chicago, Burlington and Quiney Railway Company*, 54 Iowa 223 (1880).

<sup>222</sup> See *Huggard vs. Sugar Refining Company*, 132 Iowa 724, 738 (1907). "If the master is negligent in failing to furnish a safe place to work, he will not be relieved from liability for injury to an employee, by showing that the act of a co-employee concurred with his negligence in producing the injury." See also, *Madden vs. Saylor Coal Company*, 133 Iowa 699 (1907); *Kroeger vs. Marsh Bridge Company*, 116 Northwestern 125 (Iowa, 1908); and the cases cited in *Huggard vs. Sugar Refining Company* above.

<sup>223</sup> *Gould vs. Schermer*, 101 Iowa 582 (1897); *Madden vs. Saylor Coal Company*, 133 Iowa 699 (1907).

<sup>224</sup> See Labatt's *Employer's Liability*, Secs. 472, 473. Nearly all the "reasons" worth mentioning were put forward by Chief Justice Shaw in his famous opinion in *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49 (Massachusetts, 1842). His arguments are repeated, with only minor variations, in most of the later decisions.

<sup>225</sup> "In most of the cases in which danger may be incurred, if not in all, he [the servant] is just as likely to be acquainted with the probability and extent of it as the master." — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 6 (England, 1837).

"[Plaintiff] knew that the employment in which he was engaged was perilous, and that its success was dependent on the common efforts of all the hands; and with proper diligence and prudence, he might have been as well, and it does not follow that he might not have been better informed than the defendants, about the fitness and security of all the appointments connected with the train." —

Murray *vs.* South Carolina Railroad Company, 1 McMullan 385, 402 (South Carolina, 1841).

“These are perils which the servant is as likely to know and against which he can as effectually guard, as the master.” — Farwell *vs.* The Boston and Worcester Railroad Corporation, 4 Metcalf 49, 57 (Massachusetts, 1842).

“Like the main rule, this exception is founded upon public policy, and had its origin in the idea that the employee has the means of knowing just as well as the employer all the ordinary risks incident to the service in which he is about to engage, and that these, including the perils that might arise from the negligence of other servants in the same business, entered into the contemplation of the parties in making the contract; on account of which, the law implies, the servant or employee has insisted upon a rate of compensation which would indemnify him for the hazards of the employment.” — Sullivan *vs.* Mississippi and Missouri Railroad Company, 11 Iowa 421, 423, 424 (1860).

See also Chicago and Great Eastern *vs.* Harney, 28 Indiana 28 (1867); Michigan Central Railway Company *vs.* Leahey, 10 Michigan 193 (1862).

<sup>226</sup> “The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other. . . . Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrong-doer.” — Farwell *vs.* Boston and Worcester Railroad Corporation, 4 Metcalf 49, 57, 59 (Massachusetts, 1842).



“Where many servants are employed in the same business, the liability to injury from the carelessness of their fellows is but an ordinary risk, against which the law furnishes no protection but by action against the actual wrong-doer.” — *Ryan vs. Cumberland Valley Railway Company*, 23 Pennsylvania 384, 387 (1854).

“When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.” — *Bartonshill Coal Company vs. Reid*, 3 Macqueen, House of Lords, 266, 295 (1858), Opinion of Lord Cranworth.

See also *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 423, 424 (1860); and cases collected in Labatt's *Employers' Liability*, p. 1310, footnote 8.

<sup>227</sup> “In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.” — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 7 (England, 1837).

“Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other.” — *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 59 (Massachusetts, 1842).

“And again, the law supposes that the relation which the several

employees sustain to each other, and the business in which they are engaged, would enable them better to guard against such risks and accidents, than could the employer. Besides, the moral effect of devolving these risks upon the employees themselves would be to induce a greater degree of caution, prudence and fidelity than would in all probability be otherwise exercised by them." — *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860).

"As the effects of the carelessness of one servant may frequently be obviated by the watchfulness of another, public policy requires the adoption of the rule as an incentive to superior vigilance". — *Russell vs. Hudson River Railroad Company*, 17 New York 134 (1858).

See also *Burke vs. Norwich and Worcester Railroad Company*, 34 Connecticut 474 (1867), *Norfolk and Western Railway Company vs. Nuckols*, 91 Virginia 193 (1895), and cases cited in Labatt's *Employers' Liability*, p. 1318, footnote 12.

<sup>228</sup> "Into it [the contract of service] was bodily read — because commercial necessity required it — an implied stipulation that the servant should assume the risks of the negligent acts of those fellow servants with whom he might expect to be associated, upon whose care his safety might be expected to depend." — Bohlen's *Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 31.

"If the servants who do this work almost exclusively were under no obligation to save each other's lives, and could throw all the risks of their dangerous employment upon the companies who employ them, all these great enterprises which require and employ the services of a large number of men would be seriously retarded." — *Schaub vs. Hannibal and St. Joseph Railway Company*, 106 Missouri 74, 91 (1891).

See also *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 5 (England, 1837); and *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49 (Massachusetts, 1842).

<sup>229</sup> See Labatt's *Employers' Liability*, Secs. 474, 475.

<sup>230</sup> Domestic service was the type of industry chosen by Lord Abinger to illustrate "the inconvenience and absurdity" of holding

a master liable to one servant for the negligence of another. — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 5, 6 (England, 1837).

Had the learned and antiquated Lord drawn his analogies from the factories or steam railways then flourishing all about him, his arguments might have seemed less conclusive even to himself.

<sup>231</sup> Speech of Mr. Birrell in the House of Commons, May 17, 1897, *Hansard*, 1897, Vol. XLIX (4th series), p. 692.

<sup>232</sup> *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49 (Massachusetts, 1842).

<sup>233</sup> *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421 (1860).

<sup>234</sup> *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 57 (Massachusetts, 1842).

<sup>235</sup> Warner's *Employers' Liability as an Industrial Problem in The Green Bag*, Vol. XVIII, pp. 185, 187.

<sup>236</sup> This comparison is made by Shearman and Redfield in *The Law of Negligence*, Fifth Edition, p. 266. For Chief Justice Ruffin's views on the humanity of slave beating see *State vs. Mann*, 2 Devereux 263 (North Carolina, 1829).

<sup>237</sup> "With respect to considerations of policy it is by no means certain that the public interest would not be best subserved by holding the superior, with his higher intelligence, his surer means of information, and his power of selecting, directing, and discharging subordinates, to the strictest accountability for their misconduct in his service, whoever may be the sufferer from it." — *Burke vs. Norwich and Worcester Railway Company*, 34 Connecticut 474, 480 (1867).

<sup>238</sup> Compare Lewis's *State Insurance*, p. 90.

<sup>239</sup> Jhering's *Scherz und Ernst in der Jurisprudenz*, Ninth Edition, pp. 418, 429.

<sup>240</sup> "The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit rather than enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or of

public policy." — *Ziegler vs. Danbury and Norwich Railway Company*, 52 Connecticut 543, 556 (1885).

See also Labatt's *Employers' Liability*, Sec. 475.

<sup>241</sup> *Hansard*, 1897, Vol. XLIX, p. 692.

<sup>242</sup> Quoted from Warner's *Employers' Liability as an Industrial Problem* in *The Green Bag*, Vol. XVIII, pp. 185, 187.

<sup>243</sup> See *Ziegler vs. Danbury and Norwich Railway Company*, 52 Connecticut 543 (1885); *Parker vs. Hannibal and St. Joseph Railway Company*, 109 Missouri 362, 409 (1891); *Burke vs. Norwich and Worcester Railway Company*, 34 Connecticut 474 (1867); *Driscoll vs. Allis Chalmers*, 129 Northwestern 401 (Wisconsin, 1911), remarks of Chief Justice Winslow at p. 408.

<sup>244</sup> See *Driscoll vs. Allis Chalmers*, 129 Northwestern 401 (Wisconsin, 1911), remarks of Chief Justice Winslow at p. 408; *Louisville and Nashville Railway Company vs. Melton*, 218 United States 36 (1910); *Mobile, Jackson and Kansas City Railway Company vs. Turnipseed*, 219 United States 35 (1910); *Chicago, Burlington and Quincy Railway Company vs. McGuire*, 31 Supreme Court Reporter 259 (1911); *Vindicator Consolidated Gold Mining Company vs. Firstbrook*, 36 Colorado 498 (1906); *Judd vs. Letts*, 158 California 359 (1910); *Dryburg vs. Mercur Gold Mining and Milling Company*, 55 Pacific 367 (Utah, 1898).

<sup>245</sup> The fellow-servant rule has been abrogated as to all employments, absolutely by Colorado, and contingently upon acceptance of workmen's compensation or industrial insurance acts by: California, Illinois, Kansas, Massachusetts, Michigan, New Jersey, Ohio, and Wisconsin. In Arizona, Nevada, and Washington the common law is superseded as to hazardous employments.

<sup>246</sup> The fellow-servant rule is abrogated or modified as to railways in: Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, and Texas; as to all corporations in Arizona, as to mines in Maryland (coal mines), Missouri, Montana, and Nevada (and mills). — See *Twenty-second Annual Report of*

*the United States Bureau of Labor*; and *Bulletin of the United States Bureau of Labor*, Nos. 85 *et seq.*

<sup>247</sup> *Laws of Iowa*, 1862, p. 198.

<sup>248</sup> *Laws of Iowa*, 1870, p. 161.

<sup>249</sup> *Laws of Iowa* (Public), 1872, p. 70.

<sup>250</sup> *Code of 1873*, Sec. 1307.

<sup>251</sup> *Code of 1873*, Sec. 1278; *Code of 1897*, Sec. 2039.

<sup>252</sup> *Bower vs. Burlington and Southwestern Railway Company*, 42 Iowa 546 (1876). The lessor is also liable.

<sup>253</sup> *Sloan vs. Central Iowa Railway Company*, 62 Iowa 728 (1883). Liability attaches not to the receiver personally but to the property in his hands.

<sup>254</sup> *McKnight vs. Iowa and Minnesota Railway Construction Company*, 43 Iowa 406 (1876); *Mace vs. Boedker and Company*, 127 Iowa 721 (1905).

<sup>255</sup> *McLeod vs. Sioux City Traction Company*, 125 Iowa 270 (1904).

<sup>256</sup> *Laws of Iowa*, 1902, p. 49.

<sup>257</sup> Constitution of Iowa, 1857, Art. III, Sec. 29.

<sup>258</sup> *McAunich vs. Mississippi and Missouri Railroad Company*, 20 Iowa 338, 342 (1866).

<sup>259</sup> Constitution of Iowa, 1857, Art. I, Sec. 6.

<sup>260</sup> *McAunich vs. Mississippi and Missouri Railroad Company*, 20 Iowa 338, 343, 344 (1866).

<sup>261</sup> *Bucklew vs. Central Iowa Railway Company*, 64 Iowa 603 (1884).

<sup>262</sup> *McAunich vs. Mississippi and Missouri Railroad Company*, 20 Iowa 338 (1866); *Deppe vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 52 (1872).

<sup>263</sup> *Deppe vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 52, 56 (1872).



<sup>264</sup> *Minneapolis and St. Louis Railway Company vs. Herrick*, 127 United States 210 (1888).

<sup>265</sup> *Mobile, Jackson and Kansas City Railroad Company vs. Turnipseed*, 219 United States 35 (1911) and cases cited.

<sup>266</sup> *Louisville and Nashville Railway Company vs. Melton*, 218 United States 36 (1910). Compare *Cleveland, Cincinnati, Chicago and St. Louis Railway Company vs. Foland*, 91 *Northeastern* 594 (Indiana, 1910), by which the same statute was restricted to employees engaged in train service to save it from repugnancy to the Fourteenth Amendment.

<sup>267</sup> *Louisville and Nashville Railway Company vs. Melton*, 218 United States 36 (1910), opinion of Mr. Justice White at p. 50.

<sup>268</sup> *Deppe vs. Chicago, Rock Island and Pacific Railway Company*, 36 *Iowa* 52 (1872); *Frandsen vs. Chicago, Rock Island and Pacific Railway Company*, 36 *Iowa* 372 (1873). See the Court's remarks in *Malone vs. Burlington, Cedar Rapids and Northern Railway Company*, 65 *Iowa* 417 (1884).

<sup>269</sup> *Foley vs. Chicago, Rock Island and Pacific Railway Company*, 64 *Iowa* 644, 648 (1884).

<sup>270</sup> *Larson vs. Illinois Central Railway Company*, 91 *Iowa* 81, 85 (1894); *Connors vs. Chicago and Northwestern Railway Company*, 111 *Iowa* 384 (1900).

<sup>271</sup> *Stroble vs. Chicago, Milwaukee and St. Paul Railway Company*, 70 *Iowa* 555, 560 (1886).

<sup>272</sup> *Handelun vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 *Iowa* 709 (1887).

<sup>273</sup> *Nelson vs. Chicago, Milwaukee and St. Paul Railway Company*, 73 *Iowa* 576 (1887).

<sup>274</sup> *Butler vs. Chicago, Burlington and Quincy Railroad Company*, 87 *Iowa* 206 (1893).

<sup>275</sup> *Chicago, Milwaukee and St. Paul Railway Company vs. Artery*, 137 United States 507 (1890); *Larson vs. Illinois Central Railway Company*, 91 *Iowa* 81 (1894).

<sup>276</sup> *Slaats vs. Chicago, Milwaukee and St. Paul Railway Company*, 129 Northwestern 63 (Iowa, 1911).

<sup>277</sup> *Pierce vs. Central Iowa Railway Company*, 73 Iowa 140 (1887). The fact that the plaintiff was not employed in the operation of the road held to be not material.

<sup>278</sup> *Malone vs. Burlington, Cedar Rapids and Northern Railway Company*, 65 Iowa 417 (1884); *Stroble vs. Chicago, Milwaukee and St. Paul Railway Company*, 70 Iowa 555, 560 (1886). "This negligence, to render the corporation liable, must be of an employe, and affect a co-employe, who are in some manner performing work for the purpose of moving a train".

<sup>279</sup> *Pyne vs. Chicago, Burlington and Quincy Railway Company*, 54 Iowa 223 (1880); *Handelun vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 Iowa 709 (1887); *Butler vs. Chicago, Burlington and Quincy Railroad Company*, 87 Iowa 206 (1893); *Canon vs. Chicago, Milwaukee and St. Paul Railway Company*, 101 Iowa 613 (1897); *Akeson vs. Chicago, Burlington and Quincy Railway Company*, 106 Iowa 54 (1898). *Hughes vs. Iowa Central Railway Company*, 128 Iowa 207 (1905).

<sup>280</sup> *Akeson vs. Chicago, Burlington and Quincy Railway Company*, 106 Iowa 54, 62 (1898).

<sup>281</sup> See Labatt's *Employers' Liability*, Vol. II, p. 2114, and cases cited.

<sup>282</sup> *Deppe vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 52 (1872).

<sup>283</sup> *Nelson vs. Chicago, Milwaukee and St. Paul Railway Company*, 73 Iowa 576 (1887).

<sup>284</sup> *Handelun vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 Iowa 709 (1887).

<sup>285</sup> *Smith vs. Humeston and Shenandoah Railway Company*, 78 Iowa 583 (1889).

<sup>286</sup> *Akeson vs. Chicago, Burlington and Quincy Railway Company*, 106 Iowa 54 (1898).

<sup>287</sup> *Butler vs. Chicago, Burlington and Quincy Railway Company*, 87 Iowa 206 (1893).

<sup>288</sup> *Malone vs. Burlington, Cedar Rapids and Northern Railway Company*, 65 Iowa 417 (1884).

<sup>289</sup> *Canon vs. Chicago, Milwaukee and St. Paul Railway Company*, 101 Iowa 613 (1897).

<sup>290</sup> *Hughes vs. Iowa Central Railway Company*, 128 Iowa 207 (1905).

<sup>291</sup> *Jensen vs. Omaha and St. Louis Railway Company*, 115 Iowa 404 (1902).

<sup>292</sup> *Pierce vs. Central Iowa Railway Company*, 73 Iowa 140 (1887). Plaintiff was upon a ladder leaning against the car and was injured by the negligent starting of the train.

<sup>293</sup> *Pyne vs. Chicago, Burlington and Quincy Railway Company*, 54 Iowa 223 (1880). A detective prostrated by a sunstroke and run over while in a state of insensibility.

<sup>294</sup> *Keatley vs. Illinois Central Railway Company*, 94 Iowa 685 (1895). Employee injured by the negligent running of a train at dangerous speed across an unfinished bridge.

<sup>295</sup> *Haden vs. Sioux City and Pacific Railway Company*, 92 Iowa 226 (1894). Section foreman stepped upon the track after the first section of a train had passed and was struck by the second section, the approach of which he had no reason to expect.

<sup>296</sup> *Larson vs. Illinois Central Railway Company*, 91 Iowa 81 (1894). Collision with another hand car.

In *Chicago, Milwaukee and St. Paul Railway Company vs. Artery*, 137 United States 507 (1890) it was said: "The railway was being used and operated in the movement of the hand-car, quite as much as if the latter had been a train of cars drawn by a locomotive" (p. 515).

<sup>297</sup> *Potter vs. Chicago, Rock Island and Pacific Railway Company*, 46 Iowa 399 (1877).

<sup>298</sup> *Luce vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 67 Iowa 75 (1885).

<sup>299</sup> *Manning vs. Burlington, Cedar Rapids and Northern Railway Company*, 64 Iowa 240 (1884).

<sup>300</sup> *Hathaway vs. Illinois Central Railway Company*, 92 Iowa 337 (1894).

<sup>301</sup> *Matson vs. Chicago, Rock Island and Pacific Railway Company*, 68 Iowa 22 (1885). Plaintiff injured by heavy stone thrown by a member of the same gang.

*Dunn vs. Chicago, Rock Island and Pacific Railway Company*, 130 Iowa 580 (1906). Plaintiff was struck by an iron bar which a member of the same gang had left upon the track and which was hurled off by a passing train.

<sup>302</sup> *Smith vs. Burlington, Cedar Rapids and Northern Railway Company*, 59 Iowa 73 (1882).

<sup>303</sup> *Potter vs. Chicago, Rock Island and Pacific Railway Company*, 46 Iowa 399, 401 (1877); *Schroeder vs. Chicago, Rock Island and Pacific Railway Company*, 41 Iowa 344, 347 (1875).

<sup>304</sup> *Hunt vs. Chicago and Northwestern Railway Company*, 26 Iowa 363 (1868).

<sup>305</sup> *Murphy vs. Chicago, Rock Island and Pacific Railway Company*, 45 Iowa 661 (1877).

<sup>306</sup> *Schroeder vs. Chicago, Rock Island and Pacific Railway Company*, 41 Iowa 344 (1875).

<sup>307</sup> *Hughes vs. Iowa Central Railway Company*, 128 Iowa 207 (1905).

<sup>308</sup> *Mumford vs. Chicago, Rock Island and Pacific Railway Company*, 128 Iowa 685, 691, 693 (1905).

<sup>309</sup> *Mumford vs. Chicago, Rock Island and Pacific Railway Company*, 128 Iowa 685 (1905).

<sup>310</sup> See a replica of the application for membership in the *Report of the Iowa Bureau of Labor Statistics*, 1895-1896, pp. 99, 100. The pertinent stipulations are set out in Downey's *History of Labor Legislation in Iowa*, pp. 179-181.

<sup>311</sup> See *Report of the Iowa Bureau of Labor Statistics*, 1895-1896, pp. 94-176, which contains the hearings on the Temple Amendment

before the Senate Committee, in 1897, and also a statement by the assistant superintendent of the Burlington Voluntary Relief Department. See also a summary of the arguments *pro* and *con* by Mr. Justice Hughes of the Supreme Court of the United States in *Chicago, Burlington and Quincy Railway Company vs. McGuire*, 31 Supreme Court Reporter 259, 260 (1911).

<sup>312</sup> *Donald vs. Chicago, Burlington and Quincy Railway Company*, 93 Iowa 284 (1895).

<sup>313</sup> *Journal of the House of Representatives*, 1897, pp. 279, 280.

<sup>314</sup> *Journal of the House of Representatives*, 1897, pp. 791, 792, 809, 818, 930, 960, 968, 969; *Journal of the Senate*, 1897, pp. 649, 792, 793, 860, 888, 1105, 1106. The Temple Amendment affected Sec. 38 of *Senate File*, No. 20, 26th General Assembly, Extra Session (1897).

<sup>315</sup> *Iowa Official Register*, 1898, pp. 135, 138.

<sup>316</sup> The vote in the Senate was 39 to 4; in the House, 96 to 1. — *Journal of the Senate*, 1898, p. 342; *Journal of the House of Representatives*, 1898, p. 529.

<sup>317</sup> *Laws of Iowa*, 1898, p. 33; *Supplement of 1907*, Sec. 2071.

<sup>318</sup> *McGuire vs. Chicago, Burlington and Quincy Railroad Company*, 131 Iowa 340 (1906) and 138 Iowa 664 (1908); *Chicago, Burlington and Quincy Railroad Company vs. McGuire*, 219 United States 549 (1911).

<sup>319</sup> "It is not enough to show that the defendant was guilty of negligence, but it must appear that the injured party was not also negligent and blameable. It is the duty of the party injured, as well as of the party accused of negligence, to use all reasonable means to foresee and prevent injury; and if such means are not employed by the injured party, there can be no recovery for the injury." — *Donaldson vs. Mississippi and Missouri Railroad Company*, 18 Iowa 280 (1865).

<sup>320</sup> *Cooley on Torts*, Third Edition, p. 1457; *Butterfield vs. Forrester*, 11 East 60 (England, 1809); *Wright vs. Illinois and Mississippi Telegraph Company*, 20 Iowa 195 (1866); *Haley vs. Chicago*



and Northwestern Railway Company, 21 Iowa 15 (1866) ; *Sherman vs. Western Stage Company*, 24 Iowa 515 (1868).

The doctrine of contributory negligence is stated or applied in numberless cases.

<sup>321</sup> The negligence which will defeat recovery for a personal injury is "any want of ordinary care, however slight, which as an efficient cause contributes to the injury." — *Cooper vs. Oelwein*, 145 Iowa 181, 183, 184 (1909).

See also *O'Keefe vs. Chicago, Rock Island and Pacific Railway Company*, 32 Iowa 467 (1871) ; *Rietveld vs. Wabash Railroad Company*, 129 Iowa 249 (1906) ; *Jerolman vs. Chicago Great Western Railway Company*, 108 Iowa 177 (1899).

<sup>322</sup> *Hatfield vs. Chicago, Rock Island and Pacific Railway Company*, 61 Iowa 434 (1883) ; *Yeager vs. Chicago, Rock Island and Pacific Railway Company*, 135 Northwestern 638 (Iowa, 1912).

"When the negligence of the plaintiff is proximate, and that of the defendant remote, . . . no action can be sustained. . . . On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault." — *Haley vs. Chicago and Northwestern Railway Company*, 21 Iowa 15, 25 (1866).

<sup>323</sup> *Wright vs. Illinois and Mississippi Telegraph Company*, 20 Iowa 195 (1866). But the plaintiff can not recover for such enhancement of damages as may be attributable to his want of care.

<sup>324</sup> "When the negligent act which causes an injury is done after the negligence of the injured party is known to the other party, and the injury could have been avoided by the exercise of reasonable care on his part, there is an exception to the general rule, and the contributory negligence of the injured party will not defeat a recovery." — *Keefe vs. Chicago and Northwestern Railway Company*, 92 Iowa 182, 186 (1894).

For applications of the doctrine of "last clear chance", see *Conners vs. Burlington, Cedar Rapids and Northern Railway Company*, 87 Iowa 147 (1893) ; *Haden vs. Sioux City and Pacific Railway Company*, 92 Iowa 226 (1894) ; *Wilkins vs. Omaha and Council*

Bluffs Railway Company, 96 Iowa 668 (1896); *Goodrich vs. Burlington*, Cedar Rapids and Northern Railway Company, 103 Iowa 412 (1897).

The doctrine applies even where the negligence of the injured party continued up to the time of the injury, if the defendant did, and the injured person did not, become aware of his peril in time to avoid the catastrophe. — *Bruggeman vs. Illinois Central Railway Company*, 147 Iowa 187, 205 (1910).

It appears to be settled in Iowa, that, to bring a case within the doctrine of "last clear chance", the defendant must have had actual knowledge of the other's negligence in time to avoid the injury. — *Bourrett vs. Chicago and Northwestern Railway Company*, 132 Northwestern 973 (Iowa, 1911), opinion of Chief Justice Sherwin at p. 975; *Purcell vs. Chicago and Northwestern Railway Company*, 117 Iowa 667, 671 (1902); *Keefe vs. Chicago and Northwestern Railway Company*, 92 Iowa 182, 186 (1894).

But Mr. Justice Ladd believes that the rule is [should be] that the defendant is liable if he could have discovered the plaintiff's peril and avoided the injury by the exercise of ordinary care. — See his dissenting opinion in *Bourrett vs. Chicago and Northwestern Railway Company*, 132 Northwestern 973, 976-979 (Iowa, 1911).

<sup>325</sup> The doctrine of "last clear chance" is commonly traced to Lord Abinger's decision in *Davies vs. Mann*, 10 Meeson and Welsby 546 (England, 1842).

See Schofield's *Davies vs. Mann: Theory of Contributory Negligence* in the *Harvard Law Review*, Vol. III, p. 263; also *Salmond on Torts*, Second Edition, 1910, p. 36.

<sup>326</sup> "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered wholly responsible for it. . . . The rule constitutes no exception to the general doctrine of contributory negligence . . . but merely operates to relieve the negligence of the plaintiff, which would otherwise be regarded as contributory, from its character as such." — *Bourrett vs. Chicago and Northwestern Railway Company*, 132 Northwestern 973 (Iowa, 1911), dissenting opinion of Mr. Justice Ladd at p. 977.

In *Bruggeman vs. Illinois Central Railway Company*, 147 Iowa

187 (1910), it appeared that defendant's agents did, and plaintiff did not, actually know of plaintiff's danger in time to have avoided the injury by the exercise of ordinary care; but it further appeared that the plaintiff was negligent in unnecessarily putting himself into a place of danger and that his negligence continued to the very moment of the injury. After holding that the defendant was liable, Mr. Justice Deemer went on to say (at p. 205): "If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other." "Power to prevent the catastrophe", in this passage may be taken to mean *knowledge and ability to avoid the injury* by the exercise of ordinary care, not ability to *discover and avoid* the injury by the exercise of such care.

To the same effect, apparently, is the decision in *Miller vs. Cedar Rapids Sash and Door Company*, 134 Northwestern 411, 415 (Iowa, 1912), that concurrent negligence on the part of the plaintiff, which does not intervene between the continuing negligence of the defendant and the injury of the plaintiff, although but for such concurrent negligence the injury would not have occurred, is not a bar to recovery.

<sup>327</sup> Labatt's *Employers' Liability*, Ch. XVIII.

<sup>328</sup> See Labatt's *Employers' Liability*, Sec. 309 and note 3.

The present writer has found no Iowa decision which clearly holds that a servant was guilty of contributory negligence in continuing at work with knowledge and appreciation of an abnormal danger. In *Sedgwick vs. Illinois Central Railway Company*, 76 Iowa 340 (1888), a brakeman was trying to effect an uncoupling when the train started without warning. He remained between the car and tender, walking backward, until his foot caught in a defective cattle guard and he was run over and killed. *Held* that the brakeman was guilty of contributory negligence in not abandoning the attempt to complete the uncoupling as soon as the train started and in not remembering the presence of the cattle guard (p. 341), and also that "when he voluntarily remained at the coupling, with knowledge that the train was in motion, he . . . assumed

all the risks which he incurred, including the dangers of the cattle-guard." (p. 342). The court here appears to have confused contributory negligence at the time of the injury with assumption of risk. In *Brownfield vs. Chicago, Rock Island and Pacific Railway Company*, 107 Iowa 254, 259 (1899) there is a similar want of clear distinction. But neither case in any way turned upon the distinction.

The distinction referred to would be important, e. g., in a case where the master's promise to repair had relieved the servant of assumption of risk but where the danger was so imminent that a prudent man would not have encountered it. The Assumption of Risk Act of 1909 may necessitate a clearer determination of what constitutes contributory negligence in continuing at work.

<sup>329</sup> See below, p. 57.

<sup>330</sup> *Rose vs. Des Moines Valley Railway Company*, 39 Iowa 246 (1874); *Seagel vs. Chicago, Milwaukee and St. Paul Railway Company*, 83 Iowa 380 (1891).

An employee will not be guilty of contributory negligence in the exercise of such reasonable and ordinary care as a man of reasonable caution would have exercised under the circumstances. — *Greenleaf vs. Dubuque and Sioux City Railroad Company*, 33 Iowa 52, 57, 58 (1871).

"One will not be guilty of contributory negligence who has exercised ordinary care to avoid injury." — *Hamilton vs. Des Moines Valley Railway Company*, 36 Iowa 31 (1873).

"Ordinary care to discover threatened injury is all that is required under the doctrine of contributory negligence." — *Stanley vs. Cedar Rapids and Marion City Railway Company*, 119 Iowa 526, 531 (1903).

<sup>331</sup> "The employee should exercise such care as a prudent person might reasonably be expected to exercise in view of all the circumstances of the particular case, so far as they are known to him, or are discoverable in the exercise of proper diligence." — *Baird vs. Chicago, Rock Island and Pacific Railway Company*, 61 Iowa 359, 361, 362 (1883).

A high degree of care is reasonable in running a train at night

during or immediately after a heavy storm. — *Seagel vs. Chicago, Milwaukee and St. Paul Railway Company*, 83 Iowa 380 (1891).

<sup>332</sup> *Sprague vs. Atlee*, 81 Iowa 1 (1890). A boy of thirteen, inexperienced in the operation of a buzz-saw was not, as a matter of law, guilty of negligence in changing the gauge in the manner in which he had been taught to do it, though there may have been other and safer methods of effecting the change.

<sup>333</sup> *Hazlerigg vs. Dobbins*, 145 Iowa 495, 499 (1909). A boy of fourteen was not guilty of contributory negligence in permitting his feet to dangle from the power-sweep whereon he was riding, though similar conduct on the part of an elder person would have been negligent. "Prior to the age of fourteen years", said Mr. Justice McClain in speaking for the court, "there is a presumed incapacity which must be overcome in order to defeat recovery on account of contributory negligence by proof that the child did not exercise the care and discretion usual with children of similar age, which is assumed to be less than that required of persons of mature years."

Compare *Doggett vs. Chicago, Burlington and Quincy Railway Company*, 134 Iowa 690 (1907).

<sup>334</sup> *McDermott vs. Iowa Falls and Sioux City Railway Company*, 85 Iowa 180 (1892). Brakeman injured by slipping upon ice-covered end-gate. It was held that the question of his negligence in stepping upon the end-gate would depend upon the haste required in the performance of the duty in which he was then engaged.

<sup>335</sup> *Frandsen vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 372, 375 (1873). But an emergency created by an employee will not excuse his contributory negligence at the time of the injury. *Nelling vs. Chicago, St. Paul and Kansas City Railway Company*, 98 Iowa 554, 562 (1896).

<sup>336</sup> *Pike vs. Cedar Rapids and Marion City Railway Company*, 131 Northwestern 50 (Iowa, 1911). A street car conductor, holding a broken trolley pole, was not, as a matter of law, guilty of contributory negligence in failing to see a span of wire to which his back was turned while he adjusted the trolley-wheel.

So in *Bryce vs. Chicago, Milwaukee and St. Paul Railway Company*, 103 Iowa 665 (1897). A brakeman was struck by bolts pro-



jecting from a truss built on the side of a bridge while he was climbing down the side ladder of a box-car in order to reach a flat-car to release the brake on the latter. It was held that he was not negligent, as a matter of law, in not looking out for a danger which resulted from improper construction of the bridge, and of which he had no actual knowledge. Compare *McKee vs. Chicago, Rock Island and Pacific Railway Company*, 83 Iowa 616 (1891), where an opposite conclusion was reached from a similar state of facts.

<sup>337</sup> No one can be charged with negligence in failing to avoid dangers of which he knows nothing. — *Kearns vs. Chicago, Milwaukee and St. Paul Railway Company*, 66 Iowa 599 (1885).

See also *Short vs. Fort Dodge Light and Power Company*, 149 Iowa 303 (1910).

<sup>338</sup> *Greenleaf vs. Dubuque and Sioux City Railroad Company*, 33 Iowa 52 (1871).

<sup>339</sup> *Nichols vs. Chicago, Rock Island and Pacific Railway Company*, 69 Iowa 154, 155 (1886).

<sup>340</sup> *Greenleaf vs. Illinois Central Railroad Company*, 29 Iowa 14 (1870); *Nichols vs. Chicago, Rock Island and Pacific Railway Company*, 69 Iowa 154 (1886); *Stanley vs. Cedar Rapids and Marion City Railway Company*, 119 Iowa 526 (1903).

<sup>341</sup> *Sprague vs. Atlee*, 81 Iowa 1 (1890).

<sup>342</sup> *Horan vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 89 Iowa 328 (1893). A brakeman, coupling cars in the night time, is not bound to know that the ballast has been washed from between certain ties in the road-bed.

<sup>343</sup> In determining whether a brakeman was or was not negligent, it "is always competent for the jury to take into consideration the hazardous nature of the work in which brakemen are employed; their means of knowledge; what they are reasonably required to know, in the nature of their calling, of machinery; the thought and reflection demanded or expected of such persons; their just expectation that the company will exercise due care and prudence in protecting them against injury; and to give due weight to those instincts which naturally lead men to avoid injury and preserve their

lives.” — *Greenleaf vs. Illinois Central Railway Company*, 29 Iowa 14, 48 (1870).

<sup>344</sup> *Greenleaf vs. Illinois Central Railway Company*, 29 Iowa 14 (1870).

<sup>345</sup> *Pierson vs. Chicago and Northwestern Railway Company*, 127 Iowa 13 (1905).

<sup>346</sup> *Magee vs. Chicago and Northwestern Railway Company*, 82 Iowa 249 (1891). Brakeman stepped off moving train without looking to see in which direction it was going.

<sup>347</sup> *McKee vs. Chicago, Rock Island and Pacific Railway Company*, 83 Iowa 616 (1891). Brakeman was struck by the wing fence at a cattle guard, while leaning out from the side ladder of a car to investigate a broken brake beam. It was held (Justice Beck dissenting) that, being chargeable with knowledge that the wing fence approached within two feet of the bottom of the car he was negligent in leaning out in the manner that he did. To the writer it seems more consonant with justice to hold that this case comes within the rule followed in *Bryce vs. Chicago, Milwaukee and St. Paul Railway Company*, 103 Iowa 665 (1897). See note 336.

<sup>348</sup> *Doggett vs. Illinois Central Railroad Company*, 34 Iowa 284 (1872). An employee, not engaged in the operation of the train, rode upon the engine-tender, and was killed by the breaking down of a culvert. Had he ridden in the caboose, he would not have been injured. It was held that he could not recover.

<sup>349</sup> *Beckman vs. Consolidation Coal Company*, 90 Iowa 252 (1894). Employee left a “spring switch” open and was injured by a train of mine cars thereby thrown onto an “empty” track. *Stoeckle vs. Great Western Cereal Company*, 150 Iowa 383 (1911). Employee was injured by defect in machine which he had just repaired.

<sup>350</sup> *Thoman vs. Chicago and Northwestern Railway Company*, 92 Iowa 196, 198 (1894). Railway employee passed near a box car from which he knew ties were being rapidly thrown, without giving any warning of his approach.

<sup>351</sup> *Ives vs. Welden*, 114 Iowa 476 (1901).

<sup>352</sup> *Taylor vs. Star Coal Company*, 110 Iowa 40 (1899). A miner

injured on Sunday by fall of slate may recover notwithstanding his violation of the Sunday law, such an accident being no more likely to happen on Sunday than on other days.

<sup>353</sup> *Sedgwick vs. Illinois Central Railway Company*, 76 Iowa 340 (1888). Violation of rule, without necessity, is contributory negligence as a matter of law (brakeman walking between cars in an attempt to uncouple them fell into a cattle-guard of which he knew).

See also *Coffman vs. Chicago, Rock Island and Pacific Railway Company*, 90 Iowa 462 (1894).

<sup>354</sup> *Reed vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 Iowa 166 (1887). A brakeman went between cars to make a coupling, in violation of a rule of the company, but it appeared that the accident would not have been avoided had he observed the rule. It was held that he was not negligent as a matter of law.

<sup>355</sup> *Pierson vs. Chicago and Northwestern Railway Company*, 127 Iowa 13 (1905). It was not negligence as a matter of law, for a brakeman to go between cars in motion and draw a coupling pin by hand, in violation of a standing rule, when the automatic coupler was out of order.

<sup>356</sup> "It was also competent to prove this custom of the employés at variance with the rule, if it was, and acquiescence therein by the officers of the company as establishing waiver thereof as the court instructed." — *Pike vs. Cedar Rapids and Marion City Railway Company*, 131 Northwestern 50, 52 (Iowa, 1911).

See also *Spaulding vs. Chicago, St. Paul and Kansas City Railway Company*, 98 Iowa 205 (1896); *Strong vs. Iowa Central Railway Company*, 94 Iowa 380 (1895).

It is notorious that railway companies sometimes make rules which their employees are not expected to observe, but the violation of which is set up as contributory negligence. This is illustrated by the following extracts taken respectively from a General Bulletin of Rules and a "speeding up" letter of the same railway company.

From the bulletin:

"Employees before they attempt to make couplings or to uncouple will examine and see that the cars or engines to be coupled

or uncoupled, couplers, drawheads, and other appliances therewith, ties, rails, tracks, and road beds are in good, safe condition. . . . They must exercise great care in coupling and uncoupling cars. In all cases sufficient time must be taken to avoid accidents or personal injury."

From the letter:

"Entirely too much time is being lost, especially on local trains, due to train and engine men not taking advantage of conditions in order to gain time doing work, switching, and unloading and loading freight. Neither must you wait until train stops to get men in position. It is also of the utmost importance that enginemen be alive, prompt to take signals, and make quick moves. In this respect it is only necessary to call your attention to the old adage, which is a true one, that when train or engine men do not make good on local trains it thoroughly demonstrates those men are detrimental to the service as well as their own personal interests, and such men, instead of being assigned to other runs, should be dispensed with."—*Hearings before the Employers' Liability and Workmen's Compensation Commission, Senate Documents, Sixty-second Congress, 1st Session, No. 90, Vol. II, p. 239.*

<sup>357</sup> *Gibson vs. Burlington, Cedar Rapids and Northern Railway Company*, 107 Iowa 596 (1899).

<sup>358</sup> *Gorman vs. Des Moines Brick Company*, 99 Iowa 257 (1896). Employee was negligent, as a matter of law, in attempting to adjust a shaft bearing while in motion when he knew it was highly dangerous to do so and when he might easily have stopped the machine.

<sup>359</sup> *Reed vs. Burlington, Cedar Rapids and Northern Railway Company*, 72 Iowa 166 (1887); *Baird vs. Chicago, Rock Island and Pacific Railway Company*, 61 Iowa 359 (1883).

<sup>360</sup> *Horan vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 89 Iowa 328 (1893). A brakeman discarded a stick provided by the railway company to be used in making couplings. It did not appear that, under the particular circumstances the coupling could have been more safely made by the use of such stick. It was held that the question of contributory negligence was for the jury.

<sup>361</sup> *Pierson vs. Chicago and Northwestern Railway Company*, 127 Iowa 13 (1905).

<sup>362</sup> *Whitsett vs. Chicago, Rock Island and Pacific Railway Company*, 67 Iowa 150 (1885).

*Stonne vs. Hanford Produce Company*, 108 Iowa 137 (1899). Plaintiff was injured while riding on a freight elevator. It was customary for employees moving freight to ride on this elevator, though it was known to be less safe than the passenger elevator. It was held that the question of contributory negligence was for the jury.

<sup>363</sup> *Kroy vs. Chicago, Rock Island and Pacific Railway Company*, 32 Iowa 357, 366 (1871). To stand on the "deadwood" of a moving car while attempting to draw the coupling pin is negligence as a matter of law, notwithstanding the practice may be customary.

<sup>364</sup> *Baird vs. Morford*, 29 Iowa 531 (1870).

<sup>365</sup> *Hopkinson vs. Knapp and Spalding Company*, 92 Iowa 328 (1894); *Murphy vs. Chicago, Rock Island and Pacific Railway Company*, 45 Iowa 661 (1877).

<sup>366</sup> *Murphy vs. Chicago, Rock Island and Pacific Railway Company*, 45 Iowa 661 (1877).

<sup>367</sup> *Ellis vs. Republic Oil Company*, 133 Iowa 11 (1906).

<sup>368</sup> *Dalton vs. Chicago, Rock Island and Pacific Railway Company*, 104 Iowa 26 (1897).

<sup>369</sup> *Phinney vs. Illinois Central Railroad Company*, 122 Iowa 488 (1904).

<sup>370</sup> *Bulletin of the United States Bureau of Labor*, No. 92, pp. 64, 65. "Fault of the workman" includes "lack of skill, inattention or carelessness", "Failure to use safety appliances or removal of same", "Acts contrary to rules, regulations, etc.", "Horse-play, mischief, intoxication, etc.", and "Unsuitable clothing."

<sup>371</sup> Out of 238 cases investigated in Wisconsin 23.53% were estimated as due to the fault of the workman. — *Report of the Bureau of Labor Statistics, Wisconsin, 1907-1908*, p. 4. The Minnesota Bureau of Labor gives 21.05% of the cases investigated due to the



negligence and contributory negligence of the injured. — *Twelfth Biennial Report of the Bureau of Labor, Minnesota*, p. 188.

<sup>372</sup> Eastman's *Work Accidents and the Law*, p. 93.

<sup>373</sup> Compare Shearman and Redfield's *The Law of Negligence*, Fifth Edition, p. 267.

<sup>374</sup> See above, pp. 3, 4.

<sup>375</sup> Pound's *The Need of a Sociological Jurisprudence in The Green Bag*, Vol. XIX, pp. 607, 614.

<sup>376</sup> It is noteworthy that "Fault of the workman", in the much-quoted German statistics of work accidents, includes "Lack of skill, inattention, or carelessness", "Failure to use safety appliances or removal of same", "Acts contrary to rules, regulations, etc.", "Horse-play, mischief, intoxication, etc.", and "Unsuitable clothing". — *Bulletin of the United States Bureau of Labor*, No. 92, p. 65.

<sup>377</sup> Eastman's *Work Accidents and the Law*, Ch. VI.

<sup>378</sup> "Contributory negligence, strictly . . . speaking, is negligence that operates with other negligence in producing a result". — *McKely vs. Burlington, Cedar Rapids and Northern Railway Company*, 84 Iowa 455, 458 (1892).

<sup>379</sup> See above, p. 21; also Shearman and Redfield's *The Law of Negligence*, Fifth Edition, p. 93.

<sup>380</sup> See dicta to this effect in *Jerolman vs. Chicago Great Western Railway Company*, 108 Iowa 177 (1899).

<sup>381</sup> See Schofield's *Davies vs. Mann: Theory of Contributory Negligence* in the *Harvard Law Review*, Vol. III, p. 266.

<sup>382</sup> This is said to be the real reason of the rule by Shearman and Redfield's *The Law of Negligence*, Fifth Edition, p. 93; also *Beach on Contributory Negligence*, Third Edition, Sec. 12.

"This rule [of contributory negligence] is based upon two considerations, first, that no person shall be permitted to take advantage of his own wrong, and second, the supposed inability of a court of law to apportion the damages according to the respective faults of the parties." — *Wright vs. Illinois and Mississippi Telegraph Company*, 20 Iowa 195 (1866).

<sup>383</sup> For a luminous discussion of this point see Bohlen's *The Voluntary Assumption of Risk* in the *Harvard Law Review*, Vol. XX, p. 18, footnote.

<sup>384</sup> *Annotated Statutes of Indiana*, 1901, Sec. 359 a.

<sup>385</sup> Arkansas (violation of railway sixteen-hour law), *Digest of the Statutes of Arkansas*, 1904, Sec. 6654; Georgia (railway safety laws), *Acts of Georgia*, 1909, No. 289; Indiana (railway safety laws), *Acts of Indiana*, 1909, Ch. 62; Iowa (railway safety laws), *Laws of Iowa*, 1909, p. 117; Michigan (railway safety laws), *Laws of Michigan*, 1909, p. 211; Mississippi (railway safety laws), *Laws of Mississippi*, 1908, Ch. 95.

<sup>386</sup> For the admiralty rule see *Woodrop-Sims vs. Jones*, 2 Dodson's *Admiralty Reports* 83, 85 (England, 1815); and *Beach on Contributory Negligence*, Third Edition, Secs. 402-404.

"The rule of admiralty in collisions, apportioning the loss in case of mutual fault, is peculiar to the maritime law. It is not derived from the civil law. . . . It emanated from the ancient maritime codes". — *The Max Morris*, 28 Federal Reports 881, 883 (1886).

The rule applies to all cases of marine tort founded on negligence. — *Atlee vs. Packett Company*, 21 Wallace 389 (United States, 1886).

<sup>387</sup> The rule of "proportional negligence" is to be distinguished from that of "comparative negligence", with which it is sometimes confused. By the latter rule, which formerly obtained at common law in Illinois, recovery is allowed only where the negligence of the plaintiff was slight and that of the defendant gross by comparison. — See *Beach on Contributory Negligence*, Third Edition, Secs. 89-95.

Some of the statutes cited in notes 388-393 below establish the rule of "comparative", rather than that of "proportional", negligence, the distinction not being deemed important in the present connection.

<sup>388</sup> *Laws of Ohio*, 1910, p. 195.

<sup>389</sup> *Annotated Code of the District of Columbia*, 1906, Ch. 129.

<sup>390</sup> *Laws of Nevada*, 1907, Ch. 214, p. 437.

<sup>391</sup> *Laws of Maryland*, 1902, Ch. 412, p. 595.

<sup>392</sup> *Laws of Oregon*, 1911, Ch. 3.

<sup>393</sup> Georgia, *Laws*, 1909, No. 289, p. 161; Iowa, *Laws*, 1909, p. 117; Michigan, *Public Acts*, 1909, No. 104, p. 211; Nebraska, *Laws*, 1907, Ch. 48; Nevada, *Laws*, 1907, Ch. 214, p. 437; North Dakota, *Laws*, 1907, Ch. 203; South Dakota, *Laws*, 1907, Ch. 219; Texas, *Revised Civil Statutes*, 1911, Sec. 6649; Wisconsin, *Annotated Statutes*, 1906, Sec. 1816.

In Tennessee, at common law, plaintiff's negligence affects only a mitigation of damages.

<sup>394</sup> *United States Statutes at Large* (1908), Vol. XXXV, Ch. 149.

<sup>395</sup> *Laws of Iowa*, 1909, pp. 117, 118.

<sup>396</sup> See above, pp. 42-44.

<sup>397</sup> Labatt's *Employers' Liability*, Ch. XVII; *Greenleaf vs. Illinois Central Railroad Company*, 29 Iowa 14 (1870); *Kroy vs. Chicago, Rock Island and Pacific Railway Company*, 32 Iowa 357 (1871); *Perigo vs. Chicago, Rock Island and Pacific Railway Company*, 52 Iowa 276 (1879); *Duffey vs. Consolidated Block Coal Company*, 147 Iowa 225 (1910).

<sup>398</sup> "This rule finds its support in the reason that the continuance of the servant in the employment of his master is purely voluntary, and if he so continues without objection, with knowledge of defects in machinery or the incompetency of his co-employees, he is presumed to have waived the right to insist upon indemnity for injuries resulting from such incompetency and defects." — *Kroy vs. Chicago, Rock Island and Pacific Railway Company*, 32 Iowa 357, 361 (1871).

<sup>399</sup> That the doctrine of assumption of risk is but a particular application of *volenti non fit injuria* see *Thomas vs. Quartermaine*, Law Reports, 18 Queen's Bench Division, 685 (England, 1887); *Gorman vs. Des Moines Brick Company*, 99 Iowa 257 (1896); *Cowles vs. Chicago, Rock Island and Pacific Railway Company*, 102 Iowa 507 (1897); *Miller vs. White Bronze Monument Company*, 141 Iowa 701, 712, 713 (1909).

<sup>400</sup> See Labatt's *Employers' Liability*, Vol. I, p. 620.

<sup>401</sup> "Assumption of risk has come to be used in a twofold sense.

It is often said that an employee assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master when such negligence is known to the employee, and the danger therefrom appreciated by him. In the first form herein indicated a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial, and adds nothing to it in a legal sense. In the second form herein indicated it is an affirmative defense and must be specifically pleaded as such." — Mr. Justice Evans, in *Duffey vs. Consolidated Block Coal Company*, 147 Iowa 225, 228 (1910).

The two forms of "assumption of risk" are quite fully distinguished in *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906).

<sup>402</sup> " 'Assumption of risk' is, in effect, a waiver of defects and dangers, and a consent on the part of the employee to assume them, no matter whether he be careful or negligent in his conduct. . . . In such cases the injured party may at the time be in the exercise of all the care which the law requires, and still have no right of recovery. . . . Of course, facts showing contributory negligence may also prove assumption of risk; but rarely, if at all, will proof that one did not assume risk also show that at a given time he was in the exercise of ordinary prudence for his own safety. . . . Assumption of risk is a matter of contract, express or implied; while contributory negligence is a matter of conduct." — Mr. Justice Deemer in *Miller vs. White Bronze Monument Company*, 141 Iowa 701, 712, 713 (1909). Compare *Gorman vs. Des Moines Brick Company*, 99 Iowa 257 (1896). In both these cases the plaintiff was absolved from assumption of risk but denied recovery on the ground of contributory negligence.

<sup>403</sup> *Martin vs. Des Moines Edison Light Company*, 131 Iowa 734 (1906); *Mace vs. Boedker and Company*, 127 Iowa 721 (1905); *Cinkovitch vs. Thistle Coal Company*, 143 Iowa 595, 601 (1909); *Duffey vs. Consolidated Block Coal Company*, 147 Iowa 225 (1910).

<sup>404</sup> "Knowledge, either actual or imputed, because of what should

have been known by the exercise of ordinary prudence, is absolutely essential before the risk may be said to have been assumed.” — *Wilder vs. Great Western Cereal Company*, 130 Iowa 263, 269 (1906). Compare *Coates vs. Burlington, Cedar Rapids and Northern Railway Company*, 62 Iowa 486 (1883), and the cases cited in note 403 above.

<sup>405</sup> *Carver vs. Minneapolis and St. Louis Railway Company*, 120 Iowa 346, 347 (1903). — “Mere knowledge of a dangerous custom is not sufficient to throw the risk thereof upon the person having such knowledge unless he has also appreciated the danger involved.”

See also *Mace vs. Boedker and Company*, 127 Iowa 721 (1905); *Mayes vs. Chicago, Rock Island and Pacific Railway Company*, 63 Iowa 562 (1884); *Cinkovitch vs. Thistle Coal Company*, 143 Iowa 595, 601 (1909), and cases there cited.

<sup>406</sup> “An employee who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby.” — *Perigo vs. Chicago, Rock Island and Pacific Railway Company*, 52 Iowa 276, 277 (1879).

For other statements comprising the elements necessary to constitute “implied assumption of extraordinary risks”, see *Greenleaf vs. Illinois Central Railroad Company*, 29 Iowa 14, 46 (1870); *Mumford vs. Chicago, Rock Island and Pacific Railway Company*, 128 Iowa 685, 689 (1905); *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724, 735 (1906).

<sup>407</sup> “What a man . . . ought, by the exercise of reasonable diligence to know, he does know.” — *Bryce vs. Chicago, Milwaukee and St. Paul Railway Company*, 103 Iowa 665, 671 (1897).

<sup>408</sup> *Olson vs. Hanford Produce Company*, 118 Iowa 55 (1902).

<sup>409</sup> *Harney vs. Chicago, Rock Island and Pacific Railway Company*, 115 Northwestern 886 (Iowa, 1908).

<sup>410</sup> *Shebeck vs. National Cracker Company*, 120 Iowa 414 (1903).



<sup>411</sup> *Nugent vs. Cudahy Packing Company*, 126 Iowa 517 (1905). A carpenter is not presumed to have knowledge of the sufficiency of a brick pier to support a building.

<sup>412</sup> *Crabell vs. Wapello Coal Company*, 68 Iowa 751 (1886). A car conductor killed on the first day of his employment in that capacity is not chargeable with knowledge of dangers from the roof and walls of the slope.

<sup>413</sup> *Bryce vs. Chicago, Milwaukee and St. Paul Railway Company*, 103 Iowa 665 (1897). A brakeman, who is usually on the top of cars while crossing a bridge, is not chargeable with knowledge of the distance between the bridge truss and the sides of the cars.

<sup>414</sup> *Youll vs. Sioux City and Pacific Railway Company*, 66 Iowa 346 (1885). A brakeman seventeen years of age held to have assumed the risk of making a flying switch.

*McCarthy vs. Mulgrew*, 107 Iowa 76 (1898). A boy fifteen years of age who, without objection or promise of repair, works for three years with a machine, assumes the risk incident to its use and waives any defects therein.

<sup>415</sup> *Shebeck vs. National Cracker Company*, 120 Iowa 414 (1903). An instruction was erroneous which did not direct the jury to consider the age of the servant, a boy of eighteen, in determining the question of assumption of risk.

In *Woolf vs. Mauman Company*, 128 Iowa 261 (1905), an instruction was approved which made it incumbent upon the defendant to show that a boy of fourteen possessed sufficient knowledge and experience to comprehend the dangers of operating a buzz-saw.

<sup>416</sup> *Coles vs. Union Terminal Railway Company*, 124 Iowa 48 (1904).

<sup>417</sup> *Harney vs. Chicago, Rock Island and Pacific Railway Company*, 115 Northwestern 886 (Iowa, 1908).

<sup>418</sup> *Wells vs. Burlington, Cedar Rapids and Northern Railway Company*, 56 Iowa 520 (1881) .

<sup>419</sup> *Olson vs. Hanford Produce Company*, 118 Iowa 55 (1902).

<sup>420</sup> *Perigo vs. Chicago, Rock Island and Pacific Railway Company*, 52 Iowa 276 (1879).

<sup>421</sup> In *Harney vs. Chicago, Rock Island and Pacific Railway Company*, 115 Northwestern 886 (Iowa, 1908), it was held that the danger that a board will be caught and drawn back by the teeth of an unguarded saw is not apparent to an inexperienced operator. In *Kerns vs. Chicago, Milwaukee and St. Paul Railway Company*, 94 Iowa 121 (1895), it was held a yard employee is not bound to appreciate the danger of coupling a pilot bar to a box-car. But in *Sutton vs. Des Moines Bakery*, 135 Iowa 390 (1907) an experienced operative is held to have assumed the risk that his hand may be caught between the unguarded rollers of a dough mixer.

<sup>422</sup> *Money vs. Lower Vein Coal Company*, 55 Iowa 671 (1881).

<sup>423</sup> *Box vs. Chicago, Rock Island and Pacific Railway Company*, 107 Iowa 660 (1899).

<sup>424</sup> *Way vs. Chicago and Northwestern Railway Company*, 76 Iowa 393 (1888).

<sup>425</sup> *Youll vs. Sioux City and Pacific Railway Company*, 66 Iowa 346 (1885). Employee assumed the risk of making a flying switch.

<sup>426</sup> *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1107 (Iowa, 1910), and authorities there cited.

<sup>427</sup> *Martin vs. Chicago, Rock Island and Pacific Railway Company*, 118 Iowa 148 (1902). The speed ordinance, enacted for the safety of the general public, was habitually violated by the company, within the knowledge of the plaintiff.

<sup>428</sup> *Bromberg vs. Evans Laundry Company*, 134 Iowa 38, 44 (1907).

<sup>429</sup> *Sutton vs. Des Moines Bakery Company*, 135 Iowa 390 (1907). Mr. Justice McClain, rendering the opinion of the Court, treated the statutory provision that "all machinery of every description shall be properly guarded" as simply declaratory of the common law (p. 393) — i. e. as of no effect — and remarked (at p. 394), "If the plaintiff knew of the absence of a safety hood, and was, as a reasonably prudent man, charged with knowledge of the danger to him in continuing in his employment in the absence of such a safety hood, then he assumed the risk". — In the *Poli* case, cited in note 426,

this language is treated as mere *obiter dicta* and the decision is construed as turning on the question of contributory negligence.

<sup>430</sup> *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1107 (Iowa, 1910). The eager had his hand crippled by a lump of coal falling from the top of the shaft. A statute requires a sufficient cover overhead on every box or carriage used for hoisting purposes, and the injury was due to a violation of this statute.

<sup>431</sup> *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105 (Iowa, 1910), opinion of Mr. Justice Weaver at p. 1106.

<sup>432</sup> *Tyrrell vs. Cain*, 128 Northwestern 536 (Iowa, 1910), majority opinion by Mr. Justice McClain at p. 537. But this case has been withdrawn for a re-hearing.

<sup>433</sup> *Stephenson vs. Sheffield Brick and Tile Company*, 130 Northwestern 586, 588 (Iowa, 1911); *Miller vs. Cedar Rapids Sash and Door Company*, 134 Northwestern 411, 416 (Iowa, 1912); *Verlin vs. United States Gypsum Company*, 135 Northwestern 402, 404 (Iowa, 1912); *Lamb vs. Wagner Manufacturing Company*, 136 Northwestern 203, 204 (Iowa, 1912).

<sup>434</sup> *Kilpatrick vs. Grand Trunk Railway Company*, 74 Vermont 288 (1902), a leading case; *Sipes vs. Michigan Starch Company*, 137 Michigan 258 (1904); *Durant vs. Lexington Coal Mining Company*, 97 Missouri 62 (1888); *Green vs. Western American Company*, 30 Washington 87 (1902); *Island Coal Company vs. Swaggerty*, 159 Indiana 664 (1902); *Spring Valley Coal Company vs. Patting*, 210 Illinois 342 (1904).

<sup>435</sup> See the dissenting opinion of Mr. Justice Deemer in *Tyrrell vs. Cain*, 128 Northwestern 536, 540 (Iowa, 1910).

<sup>436</sup> "It is only where an employee has been made aware of the danger, sufficiently in advance to enable him to protect himself therefrom that application of the doctrine of assumption of risk can be made. Now, knowledge of the danger may come from a warning given, or by actual discovery thereof, in time to avoid an accident."—*Coles vs. Union Terminal Company*, 124 Iowa 48, 51, 52 (1904).

Compare *Pieart vs. Chicago, Rock Island and Pacific Railway Company*, 82 Iowa 148, 159-162 (1891).

<sup>437</sup> *Bryce vs. Burlington, Cedar Rapids and Northern Railway Company*, 128 Iowa 483, 487 (1905).

<sup>438</sup> "If he made such protest and was given a promise that it should be repaired, he did not assume the risk until such time had elapsed, without the promise being complied with, as that a person of ordinary care and prudence would understand that the promise was not to be kept. After the expiration of such time, plaintiff, if he continued in defendant's employ, would in law re-assume the hazard, and could not recover for any injuries received by reason of the defect." — *Miller vs. White Bronze Monument Company*, 141 Iowa 701, 708, 709 (1908).

To the same effect see *Bruns vs. North Iowa Brick Company*, 130 Northwestern 1083, 1085 (Iowa, 1911); *Foster vs. Chicago, Rock Island and Pacific Railway Company*, 127 Iowa 84 (1905).

<sup>439</sup> *Stoutenburgh vs. Dow, Gilman, Hancock Company*, 82 Iowa 179 (1891).

<sup>440</sup> *Pieart vs. Chicago, Rock Island and Pacific Railway Company*, 82 Iowa 148, 159-162 (1891). The railway company was bound by the promise of a yardmaster in regard to repairing a switch engine.

<sup>441</sup> "The servant does not, by simply remaining in the employ of his master, with knowledge of defects in the machinery which he is obliged to use, assume the risks attendant upon the use of such machinery. Such results follow only when he remains in the master's service without objection or protest against the continuance of the defects." — *Greenleaf vs. Dubuque and Sioux City Railroad Company*, 33 Iowa 52, 58 (1871).

A similar expression was used in *Box vs. Chicago, Rock Island and Pacific Railway Company*, 107 Iowa 660, 668 (1899).

But such expressions are to be treated as *dicta*, or as incomplete statements of the law, sufficient only for the particular case. Neither case herein cited is authority for a rule whereby mere protest, without promise of repair, would relieve a servant of assumption of risk.

<sup>442</sup> "If the deceased knew there were no run-boards on the engine, and continued in the employment without complaint, or if, having complained, he continued in the employment without assurances from which he had a right to believe that run-boards would be fur-

nished, then he waived the negligence, and assumed the risk". — *Pieart vs. Chicago, Rock Island and Pacific Railway Company*, 82 Iowa 148, 161 (1891).

See also *Mumford vs. Chicago, Rock Island and Pacific Railway Company*, 128 Iowa 685 (1905).

<sup>443</sup> *Frandsen vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 372 (1873). A section hand remained on hand car by order of the foreman, though he knew that a passenger train for which the section crew were to yield the track was overdue. *Strong vs. Iowa Central Railway Company*, 94 Iowa 380 (1895). Brake-man stood on the locomotive pilot to make a coupling by order of the engineer.

<sup>444</sup> *Gorman vs. Des Moines Brick Company*, 99 Iowa 257 (1896). An order to crowd a machine and not to allow it to stop was not a command to attempt to adjust its bearings while in motion.

<sup>445</sup> *Wahlquist vs. Maple Grove Coal and Mining Company*, 116 Iowa 720 (1902).

<sup>446</sup> *Stomne vs. Hanford Produce Company*, 108 Iowa 137 (1899). An employee was justified in relying upon the superintendent's assurance as to the safety of an elevator cable.

"Quite naturally, an employé is inclined to rely upon instructions or information of his superior in charge as to the manner of performing the duties exacted of him. The tendency thereof is to lull him into security and influence him to yield, without the investigation he otherwise would have made, to such superior's judgment with respect to the method to be pursued in doing what is required." — *Verlin vs. United States Gypsum Company*, 135 Northwestern 402, 404 (Iowa, 1912).

<sup>447</sup> *Perigo vs. Chicago, Rock Island and Pacific Railway Company*, 52 Iowa 276 (1879).

<sup>448</sup> *Labatt's Employers' Liability*, Section 281.

<sup>449</sup> "The doctrine was first announced, in all its repulsive nakedness, by the late Lord Bramwell, one of the straitest of the sect of those economic Pharisees whose Gamaliels were such writers as Ri-



cardo and John Stuart Mill." — Labatt's *Employers' Liability*, Vol. I, p. 156.

<sup>450</sup> "Apart from the relation of master and servant, and independent altogether of it, one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person." — *Thomas vs. Quartermaine*, Law Reports, 18 Queen's Bench Division, 685, 699 (England, 1887).

<sup>451</sup> "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself". — *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 5, 6 (England, 1837).

"No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger." — Chancellor Johnson's opinion in *Murray vs. South Carolina Railroad Company*, 1 McMullan 385, 402 (South Carolina, 1841).

"Where several persons are employed in the conduct of one common enterprise . . . each is an observer of the conduct of the others . . . and can leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require." — *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 59 (Massachusetts, 1842).

"This rule finds its support in the reason that the continuance of the servant in the employment of his master is purely voluntary". — *Kroy vs. Chicago, Rock Island and Pacific Railway Company*, 32 Iowa 357, 361 (1871).

Compare *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 424 (1860).

<sup>452</sup> The theory that *volenti non fit injuria* applies to cases where the plaintiff's "assent" to the wrong done him is a mere implication from the fact that the danger was knowingly encountered is a recent development of law. — Labatt's *Employers' Liability*, Vol. I, p. 971.

Implied assumption of extra-ordinary risks seems to have been first explicitly laid down by Lord Bramwell in *Dynen vs. Leach*, 26 Law Reports, Exchequer, New Series, 221 (1857). The rule was

first applied in Iowa in 1870. — *Greenleaf vs. Illinois Central Railway Company*, 29 Iowa 14.

<sup>453</sup> “Nor is it true in the broadest sense that the workman may leave the service. It might be true from the standpoint of one writing a treatise on free will”. — Lewis’s *State Insurance*, p. 88.

<sup>454</sup> “Notwithstanding the absolute liberty with which every individual is legally endowed to enter into contract for his personal labor or service and his equal legal right to abandon such service at any time subject only to liability for damages in case such act be not justified, it is nevertheless true in practical life that poverty, scarcity of employment, dependent family, and other circumstances often impose a moral compulsion upon the laborer to accept employment upon such terms and under such conditions as are offered him, and it is in recognition of this fact, as well as the further facts, that society has a direct interest in preserving the lives and promoting the well being of all persons engaged in productive industry that laws have been enacted to protect them against unnecessary hazard of injury by failure of employers to exercise proper care for their safety.” — *Poli vs. Numa Block Coal Company*, 127 Northwestern 1105, 1107 (Iowa, 1910).

“Everybody knows that there are large classes who get their living from day to day, in such service as the plaintiff was engaged, who must work where they are working, and keep their jobs at all hazards, if they would not bring themselves and their families to want.” — *Kilpatrick vs. Grand Trunk Railway Company*, 52 Atlantic 531, 535 (Vermont, 1902).

<sup>455</sup> “The liberty of the wage-earner to contract for extra pay for extra hazard and to seek some other employment if he does not like his master’s methods is a myth”. — *Caspar vs. Lewin*, 109 Pacific 657, 667 (Kansas, 1910).

See dissenting opinion of Mr. Justice Beck in *Patton vs. Central Iowa Railway Company*, 73 Iowa 306, 310 (1887).

<sup>456</sup> *Kilpatrick vs. Grand Trunk Railway Company*, 62 Atlantic 531, 535 (Vermont, 1902).

<sup>457</sup> “The doctrine [of assumption of risks], to say the least of it, in its effects is cruel and oppressive towards the employes who are

thus compelled to choose between employment with dangers known to them and idleness with safety. The necessities of nature, bread and raiment will compel them to take even dangerous employment rather than idleness with want. Employers thus hold a whip over their employes, forcing them to perform services attended by dangers arising from the negligent acts of the employers themselves." — Dissenting opinion of Mr. Justice Beek in *Patton vs. Central Iowa Railway Company*, 73 Iowa 306, 311 (1887).

<sup>458</sup> The Iowa Supreme Court has declared that the doctrine ought not to be extended beyond the limits fairly indicated by controlling precedents. — *Arenschield vs. Chicago, Rock Island and Pacific Railway Company*, 128 Iowa 677, 681 (1905).

<sup>459</sup> *Laws of Iowa*, 1890, p. 31; *Code of 1897*, Sec. 2083.

<sup>460</sup> *House File*, No. 14, 31st General Assembly (1906).

<sup>461</sup> *Official Directory of the Iowa Federation of Labor*, 1906, p. 133.

<sup>462</sup> Substitute for *Senate File*, No. 236, 32nd General Assembly (1907); *Official Directory of the Iowa Federation of Labor*, 1907, p. 123.

<sup>463</sup> *Laws of Iowa*, 1907, p. 182; *Code of Iowa, Supplement of 1907*, Sec. 4999-a 3.

<sup>464</sup> *Official Directory of the Iowa Federation of Labor*, 1907, pp. 123, 127.

<sup>465</sup> *Laws of Iowa*, 1909, p. 200.

<sup>466</sup> In *Miller vs. Cedar Rapids Sash and Door Company*, 134 Northwestern 411, 416 (Iowa, 1912), the assumption of risk act of 1909 was treated as valid, but neither the constitutionality nor the scope of the act was discussed, nor does it appear that a different decision would have been reached in the absence of the statute.

In *Verlin vs. United States Gypsum Company*, 135 Northwestern 402 (Iowa, 1912), plaintiff, while oiling a motor, slipped and was caught by an unguarded cog-wheel. The factory acts required such wheels to be properly guarded and it was no part of plaintiff's duty to make repairs or remedy defects. The Court remarked, at p. 404, that any doubt as to plaintiff's assumption of the risk of the absence of a guard was disposed of by the assumption of risk act of 1909.

But the Court had already held that, at common law, a servant does not assume the risk of his employer's violation of a safety-appliance statute. See note 433 above.

<sup>467</sup> *Taylor vs. Star Coal Company*, 110 Iowa 40 (1899); *Thayer vs. Smoky Hollow Coal Company*, 121 Iowa 121 (1903).

<sup>468</sup> *Wahlquist vs. Maple Grove Coal and Mining Company*, 116 Iowa 720 (1902).

<sup>469</sup> *Beckman vs. Consolidation Coal Company*, 90 Iowa 252 (1894); *Stoeckle vs. Great Western Cereal Company*, 150 Iowa 383, 389 (1911).

<sup>470</sup> *Nappa vs. Erie Railroad Company*, 195 New York 176 (1909). A skid used by freight handlers is not a part of the "ways works or machinery" of the employer.

See also *Pluckham vs. American Bridge Company*, 104 New York Appellate Division 404 (1905).

<sup>471</sup> See *Thomas vs. Quartermaine*, Law Reports, 18 Queen's Bench Division, 685 (England, 1887).

<sup>472</sup> See above, p. 47 and note 312.

<sup>473</sup> *Laws of Iowa*, 1909, pp. 117, 118.

<sup>474</sup> See *Bulletin of the United States Bureau of Labor*, No. 92, pp. 64, 65.

<sup>475</sup> *Thirteenth Biennial Report of the Wisconsin Bureau of Labor Statistics*, 1907-1908, p. 4.

<sup>476</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, 1909-1910, p. 188.

<sup>477</sup> Pound's *Enforcement of the Law* in *The Green Bag*, Vol. XX, p. 401.

<sup>478</sup> Eastman's *Work Accidents and the Law*, pp. 187, 188.

<sup>479</sup> Labatt's *Employers' Liability*, Preface.

<sup>480</sup> In twenty-three cases nothing could be learned concerning compensation, in ten cases the amount of indemnity was not ascertained, and thirteen cases were pending at the close of the investigation.

<sup>481</sup> For the facts recited in this paragraph see Eastman's *Work Accidents and the Law*, Ch. VIII.

<sup>482</sup> *Report of the Illinois Employers' Liability Commission*, 1910, pp. 183-185.

<sup>483</sup> See *First Report of the New York Employers' Liability Commission*, 1910, pp. 20-22.

<sup>484</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, 1909-1910, Part II, Ch. IV. The facts are exhibited in the following table:

INJURY	NUMBER OF CASES INVESTIGATED	CASES SUBSTANTIAL- LY INDEMNIFIED
Death	54	6
Permanent total disability	6	1
Loss of eye	9	3
Loss of hand	7	2
Loss of fingers	9	4
Loss of arm	4	2
Loss of leg	5	1
Loss of foot	9	3
Miscellaneous	5	1
Permanent injuries		
Temporary complete disability	50	25
All accidents	158	48

<sup>485</sup> *Thirteenth Biennial Report of the Wisconsin Bureau of Labor Statistics*, 1907-1908, p. 54.

<sup>486</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 25.

<sup>487</sup> Eastman's *Work Accidents and the Law*, p. 331.

<sup>488</sup> Eastman's *Work Accidents and the Law*, p. 126.

<sup>489</sup> *First Report of the New York Employers' Liability Commission*, 1910, pp. 22, 23, and Appendix, XIX.

<sup>490</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, 1909-1910, p. 155.

<sup>491</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, 1909-1910, pp. 157, 158. The startling discrepancies are due to a few very large verdicts, as \$10,000 for the loss of an arm and \$8650 for the loss of a leg. The averages really mean little and are chiefly significant as illustrating the wholly haphazard operation of the law.



<sup>492</sup> *Report of the Michigan Employers' Liability and Workmen's Compensation Commission, 1911*, pp. 9, 15, 16.

<sup>493</sup> Hospital expenses were paid by the employer in 84 per cent of the cases investigated in the Pittsburgh Survey. — *Eastman's Work Accidents and the Law*, p. 123. The cost of burial was paid by the employer in all but 113 of 355 fatal accident cases. — *Eastman's Work Accidents and the Law*, pp. 121, 122.

In 54 fatal accident cases investigated by the Minnesota Bureau of Labor, 50 per cent received no compensation, and in only 16 per cent did they receive funeral and medical expenses. — *Twelfth Biennial Report of the Minnesota Bureau of Labor, 1909-1910*, p. 155.

<sup>494</sup> *Eastman's Work Accidents and the Law*, pp. 127, 128.

<sup>495</sup> "No prudent man would engage in any perilous employment, unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger." — Chancellor Johnson's opinion in *Murray vs. South Carolina Railroad Company*, 1 McMullan 385, 402 (South Carolina, 1841).

"The risks thus arising, . . . [from dangers incident to the service] the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his hands." — *Martin vs. Des Moines Edison Light Company*, 131 Iowa 724 (1906).

"The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly." — Chief Justice Shaw's opinion in *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 57 (Massachusetts, 1842).

"All the ordinary risks incident to the service in which he is about to engage . . . entered into the contemplation of the parties in making the contract; on account of which, the law implies, the servant or employee has insisted upon a rate of compensation which would indemnify him for the hazards of the employment." — *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 423, 424 (1860).

Compare Bartonshill Coal Company *vs.* Reid, 3 Macqueen, House of Lords 266 (1858), Lord Cranworth's opinion at p. 295.

<sup>496</sup> Smith's *The Wealth of Nations*, Book I, Ch. X.

<sup>497</sup> Webb's *Industrial Democracy*, pp. 654-703.

<sup>498</sup> See Fetter's *Principles of Economics*, Chs. 25-27; Seligman's *Principles of Economics*, Ch. XXVII; Marshall's *Principles of Economics*, Fifth Edition, Book VI, Chs. III-V.

<sup>499</sup> See Lewis's *State Insurance*, p. 87, and authorities there cited.

<sup>500</sup> On these points see above, pp. 6-8.

<sup>501</sup> An expression borrowed from Eastman's *Work Accidents and the Law*, Ch. XIII.

<sup>502</sup> *Report of the Illinois Employers' Liability Commission*, 1910, p. 201.

<sup>503</sup> *Report of the Ohio Employers' Liability Commission*, 1911, Part I, p. XLV.

<sup>504</sup> Eastman's *Work Accidents and the Law*, pp. 135-142.

<sup>505</sup> *Report of the Michigan Employers' Liability and Workmen's Compensation Commission*, 1911, pp. 26, 30.

<sup>506</sup> *Report of the Illinois Employers' Liability Commission*, 1910, p. 203.

<sup>507</sup> *Report of the Ohio Employers' Liability Commission*, 1911, Part I, p. XLIV.

<sup>508</sup> *Report of the Illinois Employers' Liability Commission*, 1910, pp. 183, 198, 199.

<sup>509</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 32.

<sup>510</sup> *Report of the Illinois Employers' Liability Commission*, 1910, pp. 198, 199.

<sup>511</sup> *Baldwin vs. St. Louis, Keokuk and Northwestern Railway Company*, 63 Iowa 210 (1884); 68 Iowa 37 (1885); 72 Iowa 45 (1887); 75 Iowa 297 (1888).

<sup>512</sup> *McGuire vs. Chicago, Burlington and Quincy Railroad Company*, 131 Iowa 340 (1906) ; 219 United States 549 (1911).

<sup>513</sup> See Labatt's *Employers' Liability*, Preface, p. vii; *Report of the Illinois Employers' Liability Commission*, 1910, pp. 196, 197; *First Report of the New York Employers' Liability Commission*, 1910, p. 33; *Report of the Wisconsin Select Committee on Industrial Insurance*, 1911, Appendix I; Eastman's *Work Accidents and the Law*, Ch. XIII.

<sup>514</sup> *Report of the Illinois Employers' Liability Commission*, 1910, p. 196.

<sup>515</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 21.

<sup>516</sup> *Twelfth Biennial Report of the Minnesota Bureau of Labor*, 1909-1910, p. 156.

<sup>517</sup> *Report of the Illinois Employers' Liability Commission*, 1910, pp. 198, 199.

<sup>518</sup> *Report of the Michigan Employers' Liability and Workmen's Compensation Commission*, 1911, p. 17.

<sup>519</sup> *Report of the Illinois Employers' Liability Commission*, 1910, p. 197.

<sup>520</sup> *First Report of the New York Employers' Liability Commission*, 1910, pp. 32, 33.

<sup>521</sup> "Law is in the nature of a cock-fight, and the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs". — Manson, in the *Law Quarterly Review*, Vol. VIII, p. 161.

"The common-law theory of litigation is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. . . . We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice." — Pound's *Do We Need a Philosophy of Law* in the *Columbia Law Review*, Vol. V, p. 347.

Compare Pollock's *The Expansion of the Common Law*, p. 32.

<sup>522</sup> Of every one hundred industrial accidents fifteen go to court, seven are lost and eight won. — Boyd's *Workman's Compensation*, p. 10.

<sup>523</sup> *Report of the Wisconsin Special Committee on Industrial Insurance*, 1911, Appendix I, Tables A and B; *Report of the Illinois Employers' Liability Commission*, 1910, pp. 185, 186; *First Report of the New York Employers' Liability Commission*, 1910, p. 31.

<sup>524</sup> See symposium on *The Abuse of Personal Injury Litigation in The Green Bag*, Vol. XVIII, pp. 193-215.

It is, of course, true that the ambulance chaser, and the host of harpies ancillary to him, find their most profitable employment in other lines of personal injury cases. Still, the evil is both real and serious in employers' liability practice. — Compare Eastman's *Work Accidents and the Law*, p. 191.

<sup>525</sup> Compiled by the writer from data given in *First Report of the New York Employers' Liability Commission*, 1910, pp. 29-31.

The plaintiffs' attorney fees and court costs, and the net amount paid to plaintiffs in settlements (out of court) and damages (awarded by courts) represent estimates made by the Commission. The other amounts are from actual records furnished by employers. In computing the total received by injured workmen and their dependents the sums paid to employees' benefit associations are regarded as actually reaching injured employees, whereas it is well known that employers' contributions to such associations are principally used to defray expenses of management, the benefits paid being raised by assessments upon employees.

<sup>526</sup> *First Report of the New York Employers' Liability Commission*, 1910, pp. 29-31.

<sup>527</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 31.

The Commission gives only the total collected from employers, and the amount paid in settlements and damages. The amount absorbed by the Companies was obtained by subtraction and the amount received by plaintiffs' attorneys was (roughly) computed by the writer on the basis of data given in the *Report* on p. 30. The last-mentioned estimate is rather below than above the true figure.

<sup>528</sup> *Report of the Iowa Employers' Liability Commission*, 1912.

<sup>529</sup> *Report of the Iowa Employers' Liability Commission*, 1912.

<sup>530</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 29, and testimony of Messrs. Sherman, Quaekenbush, Ward, and Strong, in *Minutes of Evidence*, accompanying the *Report*.

<sup>531</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 35, and Appendix XX.

<sup>532</sup> Eastman's *Work Accidents and the Law*, Ch. XIII; see also Allport's *American Railway Relief Funds* in *The Journal of Political Economy* for January and February, 1912.

<sup>533</sup> On the antagonism bred by employers' liability see *First Report of the New York Employers' Liability Commission*, 1910, pp. 33, 34; the brief of H. H. Franklin, printed as Appendix V of the *Report*, and the testimony of Messrs. Cowles, Brassmith, Clark, Strong, Stillwell, Noyes, Robinson and Parsons, in the *Minutes of Evidence*, accompanying the *Report*; Eastman's *Work Accidents and the Law*, Ch. XIII.

<sup>534</sup> *Sullivan vs. Mississippi and Missouri Railroad Company*, 11 Iowa 421, 423, 424 (1860).

See also Chief Justice Shaw's opinion in *Farwell vs. Boston and Worcester Railroad Corporation*, 4 Metcalf 49, 57 (Massachusetts, 1842), and other authorities quoted in note 227 above.

<sup>535</sup> Lord Abinger's opinion in *Priestley vs. Fowler*, 3 Meeson and Welsby 1, 7 (England, 1837). — Irrelevant portions of the passage quoted are omitted in the text.

<sup>536</sup> "We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for their loss or injury." — Opinion of Mr. Justice Field in *Chicago and Milwaukee Railway Company vs. Ross*, 112 United States 377, 383 (1884).

"We do not think it likely that persons would be careless of their lives or persons and property, merely because they might have a right of action to recover for what damages they might prove they



had sustained.” — *Little Miami Railroad Company vs. Stevens*, 20 Ohio 416, 434 (1851).

<sup>537</sup> Downey's *History of Labor Legislation in Iowa*, Chs. IV-VI.

Even now comparatively little railway mileage is protected by automatic block signals although the practicability and the superior safety of that system was conclusively demonstrated years ago. — *Twenty-fourth Annual Report of the Interstate Commerce Commission*, 1910, pp. 40, 180, 181.

<sup>538</sup> Shearman and Redfield's *The Law of Negligence*, Introduction, p. vii.

<sup>539</sup> *Bulletin of the United States Bureau of Labor*, No. 78, p. 458.

<sup>540</sup> “It is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring because of the necessary exigencies of their daily occupation should be thrust upon those sufferers who are least able to bear it. . . . When the employer . . . starts in motion agencies which create risks for others, he should take all the ordinary and extraordinary risks involved.” — Former President Roosevelt's Georgia Day Address at the Jamestown Exposition, quoted in *The Green Bag*, Vol. XIX, p. 614.

“When he has yielded up life, or limb, or health in the service of that marvellous industrialism which is our boast, shall not the great public for whom he wrought be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones?” — Opinion of Chief Justice Winslow, in *Driscoll vs. Allis Chalmers*, 129 Northwestern 401, 409 (Wisconsin, 1911).

<sup>541</sup> *First Report of the New York Employers' Liability Commission*, 1910, p. 7.

<sup>542</sup> *Report of the Illinois Employers' Liability Commission*, 1910, p. 19.

<sup>543</sup> *Proceedings of the Fifteenth Annual Convention of the National Association of Manufacturers*, 1910, p. 280.

<sup>544</sup> *The Survey*, April 8, 1911.

<sup>545</sup> The Georgia Day Address at the Jamestown Exposition, quoted by Professor Pound in *The Green Bag*, Vol. XIX, p. 614.

<sup>546</sup> See Labatt's *Employers' Liability*, Preface and Secs. 61-66, 470-475; Shearman and Redfield's *The Law of Negligence*, Introduction; Pound's *The Need of a Sociological Jurisprudence* in *The Green Bag*, Vol. XIX, p. 607; Walton's *Workmen's Compensation and the Theory of Professional Risk* in the *Columbia Law Review*, Vol. XI, p. 36; Warner's *Employers' Liability as an Industrial Problem* in *The Green Bag*, Vol. XVIII, p. 185; and the article, signed by fourteen teachers of constitutional law in leading universities, in *The Outlook*, July 29, 1911.

Professor Floyd R. Mechem, of the University of Chicago, in the *American Law Review*, Vol. XLIV, p. 221, defends the unregenerate common law, including even the fellow-servant rule. But his arguments proceed wholly on the natural rights pre-suppositions of a by-gone generation — arguments which were convincing enough when addressed to the contemporaries of Chief Justice Shaw, but which convey little meaning to present-day students of society.

<sup>547</sup> Seager's *Social Insurance*, p. 53.

<sup>548</sup> See below, Ch. IV.

<sup>549</sup> The materials for this chapter are mostly taken from the elaborate study of *Workmen's Insurance and Compensation Systems in Europe* in the *Twenty-fourth Annual Report of the United States Commissioner of Labor*; Schwedtman and Emery's *Accident Prevention and Relief*; and Frankel and Dawson's *Workingmen's Insurance in Europe*.

<sup>550</sup> Compare the statement of the theory of "professional risk" in Frankel and Dawson's *Workingmen's Insurance in Europe*, p. 9.

<sup>551</sup> For the Swiss law see *Bundesgesetz über die Kranken und Unfallversicherung*, von 13 Juni, 1911, Zweiter Titel.

<sup>552</sup> See the *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. I, Ch. V; and *Bulletin of the United States Bureau of Labor*, No. 96, which contains the *Workmen's Insurance Code* of July 19, 1911.

<sup>553</sup> On the deferred payments question see *Twenty-fourth Annual*

*Report of the United States Commissioner of Labor*, under "sources of income", "financial organization", and "risk tariffs"; Schwedtman and Emery's *Accident Prevention and Relief*, Chs. III and VII; Frankel and Dawson's *Workingmen's Insurance in Europe*, pp. 112, 113.

<sup>554</sup> Estimates by competent authorities of the contributions of workmen to accident relief range from eight to seventeen per cent.

See the *Twenty-fourth Annual Report of the United States Commissioner of Labor*, p. 999; and Schwedtman and Emery's *Accident Prevention and Relief*, p. 57.

<sup>555</sup> See Schwedtman and Emery's *Accident Prevention and Relief*, pp. 45-50.

<sup>556</sup> See Dawson in *The Annals of the American Academy*, Vol. XXXVIII, p. 175.

<sup>557</sup> Frankel and Dawson's *Workingmen's Insurance in Europe*, p. 46; Brief of Miles M. Dawson in Hearings before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document No. 90*, Vol. II, pp. 249-255, Sixty-second Congress, 1st Session.

<sup>558</sup> *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. I, pp. 1095-1101. In the text additions to reserve fund are counted as part of the sum going ultimately to the insured while expenditures for accident prevention are deducted from administrative expenses.

<sup>559</sup> Compare Schwedtman and Emery's *Accident Prevention and Relief*, Chs. XI and XIII.

<sup>560</sup> See Schwedtman and Emery's *Accident Prevention and Relief*; Frankel and Dawson's *Workingmen's Insurance in Europe*; Zacher's *Die Arbeiter — Versicherung nach ihren Systemen*; Dawson's *The German Workman*; Pinkus's *Workmen's Insurance in Germany*; and the brief submitted by Miles M. Dawson to the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document*, No. 90, Vol. II, pp. 240-257, Sixty-second Congress, 1st Session.

<sup>561</sup> See the *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. II, pp. 2046, 2047.

<sup>562</sup>	COMMISSIONS	APPOINTED	REPORTED
1.	Colorado	1911	
2.	Connecticut	1911	
3.	Delaware	1911	
4.	Illinois	1910	1910
5.	Iowa	1911	1912
6.	Louisiana	1912	
7.	Maine	1911	
8.	Maryland	1911	
9.	Massachusetts	1910	1911
10.	Michigan	1911	1911
11.	Minnesota	1909	1911
12.	Missouri	1911	
13.	Nebraska	1911	
14.	New Jersey	1911	1911
15.	New York	1909	1910
16.	North Dakota	1911	
17.	Ohio	1910	1911
18.	Oklahoma	1911	
19.	Pennsylvania	1911	
20.	Texas	1911	
21.	United States	1910	1912
22.	Washington	1910	1910
23.	West Virginia	1911	
24.	Wisconsin	1909	1911

<sup>563</sup> Statutes have been enacted as follows:

1. Arizona, June 8, 1912.
2. California, April 8, 1911.
3. Illinois, June 5, 1911.
4. Kansas, March 14, 1911.
5. Maryland, April 15, 1912.
6. Massachusetts, July 28, 1911.
7. Michigan, March 20, 1912.
8. Montana, March 4, 1909.
9. Nevada, March 24, 1911.
10. New Hampshire, April 15, 1911.
11. New Jersey, April 4, 1911.
12. New York, May 24, June 25, 1912.
13. Ohio, June 15, 1911.
14. Rhode Island, April 29, 1912.
15. Washington, March 14, 1911.
16. Wisconsin, May 3, 1911.

<sup>564</sup> California, Colorado, Connecticut, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Washington, West Virginia, Wisconsin.

<sup>565</sup> Illinois and Ohio. The investigations in New York, Minnesota, and Wisconsin were conducted by persons of proven competence.

<sup>566</sup> Illinois, Iowa, Massachusetts, Minnesota, New York, Ohio, and the Federal Commission.

<sup>567</sup> The bill actually presented was a compromise to which neither the labor nor the employers' members fully agreed.

<sup>568</sup> Mr. Baldwin presented a minority report.

<sup>569</sup> A definitive report of the Maryland Commission has not, up to the present time (October, 1912) been made. About a dozen bills were introduced in the 1912 session of the legislature, some of them by members of the Commission.

<sup>570</sup> Two commissioners signed one insurance bill; the other bills were signed by one commissioner each. One member was abroad when the report was made and one protested against enacting any legislation without further study.

<sup>571</sup> Two labor members objected to the maximum death compensation fixed by the proposed bill but concurred as to the plan itself.

<sup>572</sup> Twelve members signed the report; one protested against legislation without further study.

<sup>573</sup> Mr. Wirrans submitted a minority report, which became the basis of the law enacted.

<sup>574</sup> Arizona, California, Kansas, Montana, Nevada, New Hampshire, Rhode Island.

<sup>575</sup> Massachusetts, Montana, Ohio, Washington.

<sup>576</sup> *Laws of California*, 1911, Ch. 399, Sec. 3 (3) — "wilful misconduct of the employee"; *Workmen's Compensation Act of Kansas*, 1911, Sec. 1 — "deliberate intention to cause such injury", "wilful failure to use a guard or protection", "deliberate breach of statutory regulations", or intoxication; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 8 — "deliberate intention to cause such injury"; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 2 — "serious and wilful misconduct"; *Laws of Maryland*, 1912, Ch. 837, Sec. 3 — "intoxication", "wilful and deliberate act", or "deliberate intention to



produce such injury''; *Workmen's Compensation and Employers' Liability Acts of Michigan*, Part II, Sec. 2 — "intentional and wilful misconduct"; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3 — "intoxication, violation of law or serious or wilful misconduct"; *Laws of New Jersey*, 1911, Ch. 95, Secs. 1, 7 — wilful negligence, intoxication; *Laws of New York*, 1910, Ch. 674, Sec. 217 (b) — "serious and wilful misconduct"; 102 *Ohio Laws*, 524, Sec. 21 — "purposely self-inflicted"; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 2 — wilful intention to bring about injury or death, or intoxication; *Laws of Washington*, 1911, Ch. 74, Sec. 6 — "deliberate intention" to produce injury or death; *Revised Statutes of Wisconsin*, Sec. 2394-4, 3 — "wilful misconduct".

Nevada establishes the rule of proportional negligence, even as to injuries within the Compensation Act. — *Laws of Nevada*, 1911, Ch. 183, Sec. 1.

<sup>577</sup> *Laws of California*, 1911, Ch. 399, Sec. 3 (3); *Workmen's Compensation Act of Kansas*, 1911, Sec. 2; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 3; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 3; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3; 102 *Ohio Laws* 524, Sec. 21-2; *Laws of Washington*, 1911, Ch. 74, Sec. 9; *Laws of Maryland*, 1912, Ch. 837, Sec. 15.

<sup>578</sup> *Laws of Montana*, 1909, Ch. 67.

<sup>579</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 3; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 2; *Workmen's Compensation Act of Kansas*, 1911, Sec. 6; *Laws of Nevada*, 1911, Ch. 183, Sec. 3; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 1; *Laws of New York*, 1910, Ch. 674, Sec. 215; *Laws of Washington*, 1911, Ch. 74, Sec. 2.

<sup>580</sup> *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part I, Sec. 2; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 2; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 2.

<sup>581</sup> 102 *Ohio Laws*, Secs. 20-1, 21-1; *Workmen's Compensation*

and *Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 3; *Workmen's Compensation Act of Kansas*, 1911, Sec. 8.

<sup>582</sup> *Laws of California*, 1911, Secs. 1, 4; *Laws of Maryland*, 1912, Ch. 837, Sec. 1; *Laws of New Jersey*, 1911, Ch. 95, Sec. 1; *Revised Statutes of Wisconsin*, Sec. 2394-1.

<sup>583</sup> *Laws of California*, 1911, Ch. 399, Secs. 4, 6 (1); *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1911, Sec. 5, (1); *Laws of Washington*, 1911, Ch. 74, Sec. 17; *Revised Statutes of Wisconsin*, Sec. 2394-5, 2394-7, 1.

<sup>584</sup> *Laws of Maryland*, 1912, Ch. 837, Sec. 1; *Laws of Nevada*, 1911, Ch. 183, Sec. 2; *Laws of Washington*, 1911, Ch. 74, Sec. 3; 102 *Ohio Laws* 524, Sec. 20-1.

<sup>585</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Secs. 2 and 14; *Laws of Montana*, 1909, Ch. 67, Sec. 1 — "All workmen, laborers and employees . . . except office employees, superintendents and general managers"; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 1; *Laws of New York*, 1910, Ch. 674, Sec. 215.

<sup>586</sup> *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 21.

<sup>587</sup> *Laws of California*, 1911, Ch. 399, Sec. 6 (2) — "not including any person whose employment is but casual and not in the usual course" of the business; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 22 — "work of an incidental character unconnected with the dangers necessarily involved in carrying on" any of the enumerated employments; *Workmen's Compensation Act of Kansas*, 1911, Sec. 9 (i) — "workman . . . does not include a person who is employed otherwise than for the purpose of the employer's trade or business"; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part V, Sec. 2 — "except one whose employment is but casual, or is not in the usual course" of the business; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 7-2 — identical with Massachusetts act; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 23 — "exclusive of casual employments"; *Workmen's Compensation and Employer's Liability Acts of Rhode Island*, 1912, Art. V, Sec. 1 (b) — "em-

ployee . . . . does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employers' trade or business''; *Revised Statutes of Wisconsin*, Sec. 2394-7, 2 — identical with Massachusetts act.

<sup>588</sup> *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. V, Sec. 1 (b).

<sup>589</sup> *Laws of New York*, 1911, Ch. 674, Sec. 217. The language of the Arizona, California, Kansas, Illinois, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, and Rhode Island acts is substantially the same.

<sup>590</sup> *Ruegg's Employers' Liability and Workmen's Compensation*, Eighth Edition, Chs. II and III, especially pp. 308, 309, 339.

<sup>591</sup> *Laws of Maryland*, 1912, Ch. 837, Sec. 1 — "accident occurring in the course of employment"; 102 *Ohio Laws* 524, Sec. 21 — "injured in the course of their employment"; *Laws of Washington*, 1911, Ch. 74, Sec. 5 — "injured . . . . in the course of his employment"; *Revised Statutes of Wisconsin*, Sec. 2394-4-2 — "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment."

<sup>592</sup> *Workmen's Compensation Act of Kansas*, 1911, Sec. 4; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 20; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part III, Sec. 17; *Laws of Nevada*, 1911, Ch. 183, Sec. 10; *Laws of New York*, 1911, Ch. 674, Sec. 219-g. The provisions of the several acts differ considerably.

<sup>593</sup> *Laws of Washington*, 1911, Ch. 74, Sec. 17.

<sup>594</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Secs. 1 and 2; *Laws of Nevada*, 1911, Ch. 183, Sec. 1; *Laws of New York*, 1910, Ch. 674, Sec. 217; *Laws of Washington*, 1911, Ch. 74, Sec. 1.

<sup>595</sup> *Laws of Washington*, 1911, Ch. 74, Sec. 6.

<sup>596</sup> *Laws of California*, 1911, Ch. 399, Sec. 6 (1), 7; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Secs. 7-1, 8; *Revised Statutes of Wisconsin*, Sec. 2394-7, 8.

<sup>597</sup> *Laws of California*, 1911, Ch. 399, Sec. 3; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1; *Workmen's Compensation Act of Kansas*, 1911, Sec. 47; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part I, Sec. 3; *Workmen's Compensation and Employers' Liability Act of Michigan*, 1912, Part I, Sec. 3; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 7; 102 *Ohio Laws* 534, Sec. 20-1; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 4; *Revised Statutes of Wisconsin*, Sec. 2394-1.

<sup>598</sup> *Laws of California*, 1911, Ch. 399, Sec. 1 (1), (2); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1-1, -2; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 1, (b), (c); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 2; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 2; 102 *Ohio Laws* 524, Sec. 21-1; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 1 (b), (c); *Revised Statutes of Wisconsin*, Sec. 2394-1, 1, 2.

<sup>599</sup> *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part I, Sec. 1-1; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 1 (a); *Laws of New Jersey*, 1911, Ch. 95, Paragraph 1; 102 *Ohio Laws* 524, Sec. 21-1; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 1 (a).

<sup>600</sup> *Laws of California*, 1911, Ch. 399, Sec. 1 — proportional negligence; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1-3 — proportional negligence; *Workmen's Compensation Act of Kansas*, 1911, Sec. 46 (c) — proportional negligence; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 2 — defendant has the burden of proof to show contributory negligence.

<sup>601</sup> *Laws of California*, 1911, Ch. 399, Sec. 5; *Workmen's Compensation Act of Kansas*, 1911, Sec. 44; *Acts and Resolves of Massachusetts*, 1911, Ch. 751; Part IV; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 6; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3; 102 *Ohio Laws* 524, Sec. 20-1; *Workmen's Compensation and Employers' Liability Acts of Rhode*



*Island*, 1912, Art. I, Sec. 6; *Revised Statutes of Wisconsin*, Sec. 2394-6.

<sup>602</sup> *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1, b; *Laws of New Jersey*, 1911, Ch. 95, Paragraphs 7-10.

<sup>603</sup> *Laws of California*, 1911, Ch. 399, Sec. 7 (2); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1, c; *Workmen's Compensation Act of Kansas*, 1911, Sec. 45; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part I, Sec. 5; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part I, Sec. 8-2; *Laws of New Jersey*, 1911, Ch. 95, Paragraphs 7-10; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. I, Sec. 6; *Revised Statutes of Wisconsin*, Sec. 2394-8-2.

The mode of election differs considerably, some States requiring the employee to elect at the time of hiring, or, if already employed, within a specified period after the act became operative; while other States permit election so many days before an injury is sustained. Rhode Island requires notice to the Commissioner of Industrial Statistics as well as to the employer. In a number of States the employee is presumed to have notice of his employer's election; in others notice must be posted in the place of employment.

<sup>604</sup> *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3.

<sup>605</sup> 102 *Ohio Laws* 524, Sec. 20-1.

<sup>606</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1911, Sec. 4; *Laws of Nevada*, 1911, Ch. 183, Sec. 11; *Laws of New York*, 1910, Ch. 674, Sec. 218; *Laws of Montana*, 1909, Sec. 11.

<sup>607</sup> *Laws of California*, 1911, Ch. 399, Sec. 3 (3); *Workmen's Compensation and Employer's Liability Acts of Illinois*, 1911, Sec. 3; *Workmen's Compensation Act of Kansas*, 1911, Sec. 2; *Laws of New Hampshire*, 1911, Ch. 74, Sec. 3; 102 *Ohio Laws* 524, Sec. 21-2.

<sup>608</sup> *Laws of Maryland*, 1912, Ch. 837; *Laws of New York*, 1910, Ch. 352.

<sup>609</sup> *Laws of California*, 1911, Ch. 399, Sec. 8 (1); *Workmen's Com-*



*pensation and Employers' Liability Acts of Illinois*, 1911, Sec. 5, a; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 5; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 4; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 14; 102 *Ohio Laws* 524, Sec. 23; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, Art. II, Sec. 5; *Revised Statutes of Wisconsin*, Sec. 2394-9-1.

The Montana act permitted the Auditor of State to grant medical relief when needed. — *Laws of Montana*, 1909, Ch. 67, Sec. 5.

<sup>610</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 8-3; *Laws of California*, 1911, Ch. 399, Sec. 8, (3), (d); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 4, c; *Workmen's Compensation Act of Kansas*, 1911, Sec. 11, (a), (3); *Laws of Maryland*, 1912, Ch. 837, Sec. 5, (c); *Acts and Resolves of Massachusetts*, 1911, Ch. 741, Part II, Sec. 8; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 8; *Laws of Nevada*, 1911, Ch. 183, Sec. 5, (c); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6, (1), (e); *Laws of New Jersey*, 1911, Ch. 95, Paragraph 12, (2); *Laws of New York*, 1910, Ch. 674, Sec. 219-a, (c); 102 *Ohio Laws* 524, Sec. 24; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 9; *Laws of Washington*, 1911, Ch. 74, Sec. 5, (a); *Revised Statutes of Wisconsin*, Sec. 2394-9-3, (d).

<sup>611</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 8-3; *Laws of California*, 1911, Ch. 399, Sec. 8, (3), (a); *Workmen's Compensation and Employers' Liability Acts of Illinois*, Sec. 4, a; *Workmen's Compensation Act of Kansas*, Sec. 11, (a), (1); *Laws of Maryland*, 1912, Ch. 837, Sec. 5, (1), (a); *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 6; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 5; *Laws of Montana*, 1909, Ch. 67, Sec. 5; *Laws of Nevada*, 1911, Ch. 183, Sec. 5, (a); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6, (1), (a); *Laws of New Jersey*, 1911, Ch. 95, Sec. 12, (1); *Laws of New York*, 1910, Ch. 674, Sec. 219-a, (a); 102 *Ohio Laws* 524, Sec. 28-2; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, Art. II, Sec. 6; *Laws of Wash-*

ington, 1911, Ch. 74, Sec. 5, (a); *Revised Statutes of Wisconsin*, Sec. 2394-9-3, (a).

<sup>612</sup> One-half of weekly wages for 300 weeks.

<sup>613</sup> One-half of weekly wages for 300 weeks.

<sup>614</sup> One hundred and fifty times average weekly wages.

<sup>615</sup> One-half of weekly wages for 300 weeks.

<sup>616</sup> Twenty-four hundred times one-half the daily wages.

<sup>617</sup> Twelve hundred times the daily earnings.

<sup>618</sup> Two-thirds of average weekly wages for six years.

<sup>619</sup> Arizona, Maryland, Montana, Nevada, New Hampshire, New York, and Rhode Island. See citations in note 611 above. In most of these States a court may, in its discretion, order that payments be made in installments.

<sup>620</sup> In California, Massachusetts, Michigan, Ohio, Washington, and Wisconsin commutations can be made only by, or with the approval of, the State boards charged with the administration of accident compensation or insurance. In Illinois, New Jersey, and Rhode Island pensions are commutable by courts of appropriate jurisdiction. — *Laws of California*, 1911, Ch. 399, Sec. 8, (3), (a); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 5½; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 22; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 22; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 21; 102 *Ohio Laws* 524, Sec. 34; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1911, Art. II, Sec. 25; *Laws of Washington*, 1911, Ch. 74, Sec. 7; *Revised Statutes of Wisconsin*, Sec. 2394-9-3, (a).

<sup>621</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 8; *Laws of California*, 1911, Ch. 399, Sec. 8, (2); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 5; *Workmen's Compensation Act of Kansas*, 1911, Sec. 11; *Laws of Maryland*, 1912, Ch. 837, Sec. 5; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 9; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 9; *Laws of Montana*, Ch. 67, Sec. 5; *Laws of Nevada*, 1911, Ch.

183, Sec. 6; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6 (2); *Laws of New Jersey*, 1911, Ch. 95, Paragraph 11; *Laws of New York*, 1910, Ch. 674, Sec. 219-a, 2; 102 *Ohio Laws* 524, Sec. 27; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 10; *Laws of Washington*, 1911, Ch. 74, Sec. 2, (b); *Revised Statutes of Wisconsin*, Sec. 2394-9-2, (a).

<sup>622</sup> Five hundred weeks in Massachusetts, Michigan and Rhode Island.

<sup>623</sup> Four hundred weeks.

<sup>624</sup> Three hundred weeks.

<sup>625</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 8-2; *Laws of California*, 1911, Ch. 399, Sec. 8, (2), (b); *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 5, d; *Workmen's Compensation Act of Kansas*, 1911, Sec. 11, (3), (c); *Laws of Maryland*, 1912, Ch. 837, Sec. 5, (III); *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 10; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 10; *Laws of Nevada*, 1911, Ch. 183, Sec. 6, (a); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6 (2); *Laws of New Jersey*, 1911, Ch. 95, Sec. 11, (c); *Laws of New York*, 1910, Ch. 674, Sec. 219-a, 2; 102 *Ohio Laws* 524, Sec. 26; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 11; *Laws of Washington*, 1911, Ch. 74, Sec. 5, (f); *Revised Statutes of Wisconsin*, Sec. 2394-9, (b).

<sup>626</sup> *Laws of Maryland*, 1912, Ch. 837, Sec. 5 (III); *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 10; *Laws of New Jersey*, 1911, Ch. 95, Sec. 11, (c); *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 12; *Laws of Washington*, 1911, Ch. 74, Sec. 5, (f).

<sup>627</sup> *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 5, c; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 11; *Laws of Nevada*, 1911, Ch. 183, Sec. 6, (b).

<sup>628</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 8-1; *Laws of California*, 1911, Ch. 399, Sec. 8, (2); *Workmen's Compensation and Employers' Liability Acts of*

*Illinois*, 1911, Sec. 5, b; *Workmen's Compensation Act of Kansas*, 1911, Sec. 11, (3), (b); *Laws of Maryland*, 1912, Ch. 837, Sec. 5, (III); *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 4; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 3; *Laws of Nevada*, 1911, Ch. 183, Sec. 6, (a); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6, (2); *Laws of New Jersey*, 1911, Ch. 95, Sec. 13; *Laws of New York*, 1910, Ch. 674, Sec. 219-a, 2; 102 *Ohio Laws*, 524, Sec. 25; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 4; *Revised Statutes of Wisconsin*, Sec. 2394-9-2; *Laws of Montana*, 1909, Ch. 67, Sec. 5.

<sup>629</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 9; *Laws of California*, 1911, Ch. 399, Sec. 11; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 9; *Workmen's Compensation Act of Kansas*, 1911, Sec. 17; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 19; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 19; *Laws of Nevada*, 1911, Ch. 183, Sec. 7; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 7; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 17; *Laws of New York*, 1910, Ch. 674, Sec. 219-b; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, Art. II, Sec. 21; *Laws of Washington*, 1911, Ch. 74, Sec. 13; *Revised Statutes of Wisconsin*, Sec. 2394-12.

<sup>630</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 12; *Laws of California*, 1911, Ch. 399, Sec. 22; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 11; *Workmen's Compensation Act of Kansas*, 1911, Sec. 15; *Laws of Maryland*, 1912, Ch. 837, Sec. 14; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 21; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 21; *Coal Miners' Insurance Act of Montana*, 1909, Sec. 131 (11); *Laws of New Hampshire*, 1911, Ch. 163, Sec. 10; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 22; *Laws of New York*, 1910, Ch. 674, Sec. 219-b; 102 *Ohio Laws* 524, Sec. 35; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 23; *Laws of Washington*, 1911, Ch. 74, Sec. 10; *Revised Statutes of Wisconsin*, Sec. 2394-23.



<sup>631</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 2; *Laws of California*, 1911, Ch. 399, Sec. 3; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 1; *Workmen's Compensation Act of Kansas*, 1911, Sec. 1; *Laws of Nevada*, 1911, Ch. 183, Sec. 1; *Laws of New Jersey*, 1911, Ch. 95, Sec. II; *Laws of New York*, 1910, Ch. 674, Sec. 200; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 1; *Revised Statutes of Wisconsin*, Sec. 2394-4.

<sup>632</sup> *Laws of California*, 1911, Ch. 399, Sec. 24; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Secs. 15, 16; *Workmen's Compensation Act of Kansas*, 1911, Sec. 34; *Revised Statutes of Wisconsin*, Sec. 2394-26, -27.

<sup>633</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 12; *Laws of California*, 1911, Ch. 399, Sec. 23; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 11; *Laws of Nevada*, 1911, Ch. 183, Sec. 12; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 22; *Laws of New York*, 1910, Ch. 674, Sec. 219-e; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. II, Sec. 24; *Revised Statutes of Wisconsin*, Sec. 2394-24.

<sup>634</sup> *Laws of New Hampshire*, 1911, Ch. 163, Sec. 3.

<sup>635</sup> *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part IV.

<sup>636</sup> *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part V.

<sup>637</sup> *Laws of Michigan*, 1912, House Enrolled Act, Number 5.

<sup>638</sup> *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part IV.

<sup>639</sup> *Laws of Montana*, 1909, Ch. 67.

<sup>640</sup> 102 *Ohio Laws* 524; *Laws of Washington*, 1911, Ch. 74.

<sup>641</sup> *Laws of Maryland*, 1912, Ch. 837.

<sup>642</sup> 102 *Ohio Laws* 524, Sec. 20-2.

<sup>643</sup> *Laws of Maryland*, 1912, Ch. 837, Sec. 6.

<sup>644</sup> *Laws of Montana*, 1909, Ch. 67, Sec. 2.



<sup>645</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 14; *Workmen's Compensation Act of Kansas*, 1911, Sec. 39; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 15; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. IV.

<sup>646</sup> *Laws of California*, 1911, Ch. 399, Sec. 24; *Revised Statutes of Wisconsin*, Sec. 2394-26.

<sup>647</sup> *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part II, Sec. 12; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part II, Sec. 13; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, Art. II, Sec. 14.

<sup>648</sup> *Laws of California*, 1911, Ch. 399, Secs. 12-18, 27; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part III; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part III; 102 *Ohio Laws* 524, *passim*.

<sup>649</sup> *Laws of Montana*, 1909, Ch. 67.

<sup>650</sup> *Laws of New Jersey*, 1911, Ch. 241.

<sup>651</sup> *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 19; *Workmen's Compensation Act of Kansas*, 1911, Sec. 16; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 12.

<sup>652</sup> *Laws of Maryland*, 1912, Ch. 837, Secs. 16, 17, 18.

<sup>653</sup> *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Sec. 19; *Workmen's Compensation Act of Kansas*, 1911, Sec. 16; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part III, Sec. 18; *Employers' Liability and Workmen's Compensation Acts of Michigan*, 1912, Part III, Sec. 17; *Laws of New Jersey*, 1911, Ch. 241, Sec. 2; *Laws of Washington*, 1911, Ch. 74, Sec. 14; *Laws of Wisconsin*, 1911, Ch. 469.

<sup>654</sup> *Workmen's Compensation and Employers' Liability Act of Arizona*, 1912, Sec. 11; *Laws of California*, 1911, Ch. 399, Secs. 15-21; *Workmen's Compensation and Employers' Liability Acts of Illinois*, 1911, Secs. 10, 11; *Workmen's Compensation Act of Kansas*, 1911, Secs. 23-38; *Laws of Maryland*, 1912, Ch. 837, Sec. 13; *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part III; *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part

III; *Laws of Montana*, 1909, Ch. 67, Sec. 10 [130]; *Laws of Nevada*, 1911, Ch. 183, Secs. 8, 9; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 9; *Laws of New Jersey*, 1911, Ch. 95, Paragraphs 18, 20; *Laws of New York*, 1910, Ch. 674, Sec. 219-d; 102 *Ohio Laws* 524, Sec. 36; *Workmen's Compensation and Employers' Liability Acts of Rhode Island*, 1912, Art. III; *Laws of Washington*, 1911, Ch. 74, Sec. 20; *Revised Statutes of Wisconsin*, Secs. 2394-15-22.

<sup>655</sup> This is not the language of the statute but such is the interpretation placed upon Section 20 by the Industrial Insurance Commission. — See *Workmen's Compensation Act of the State of Washington*, issued by the Industrial Insurance Commission, January, 1912, p. 32, note.

<sup>656</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554 (Montana, 1911).

<sup>657</sup> *Ives vs. South Buffalo Railway Company*, 201 New York 271 (1911).

<sup>658</sup> Opinion of the Justices, 96 Northeastern 308 (Massachusetts, 1911).

<sup>659</sup> *State ex rel. Yaple vs. Craemer*, 97 Northeastern 602 (Ohio, 1912).

<sup>660</sup> *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101 (Washington, 1911).

<sup>661</sup> *Borgnis et al. vs. Falk Company*, 133 Northwestern 209 (Wisconsin, 1911).

<sup>662</sup> "When our Constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." — Mr. Justice Werner in *Ives vs. South Buffalo Railway Company*, 201 New York 271, 293 (1911).

<sup>663</sup> Due "process of law . . . . means . . . . that every man's right to life, liberty and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted." — Mr. Justice Werner in *Ives vs. South Buffalo Railway Company*, 201 New York 271, 293 (1911).

<sup>664</sup> See Mercer's *Constitutionality of Workmen's Compensation Acts* (pamphlet); Harper's *Workmen's Compensation in Illinois* in *Illinois Law Review*, Vol. VI, pp. 170-188, 255-261; constitutional briefs in the reports of the employers' liability commissions of New York, Ohio, and Washington; the brief submitted by the Industrial Commission of Wisconsin in *in re Filler and Stowell Company* (pamphlet); briefs of Yaple and Hogan in *State ex rel. Yaple vs. Creamer* (pamphlets) and Hearing before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document* No. 90, Vol. II, Sixty-second Congress, first session, briefs of Launcelot Packer, Frank B. Kellogg, and Ernst Freund, of the National Civic Federation and of Congressman Sabath.

<sup>665</sup> See pp. 12, 13, 15 above and authorities there cited.

<sup>666</sup> See Wambaugh's *Workmen's Compensation Acts: Their Theory and Their Constitutionality* in the *Harvard Law Review*, Vol. XXV, p. 129.

<sup>667</sup> Said Lord Brougham, in *Duncan vs. Findlater*, 6 Clark and Finelly 893, 910 (England, 1839): "I am liable for what is done for me and under my orders by the man I employ . . . and the reason I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

<sup>668</sup> Much is made of these analogies in the briefs of Messrs. E. V. Mercer, Launcelot Packer, and Ernst Freund, cited in note 664 above.

<sup>669</sup> See the luminous opinion of Chief Justice Winslow in *Borgnis et al vs. Falk Company*, 133 Northwestern 209, 215, 216 (Wisconsin, 1911). Compare Mr. Justice Holmes's statement: "We must be cautious about pushing the broad words of the 14th Amendment to a drily logical extreme". — *Noble State Bank vs. Haskell*, 31 Supreme Court Reporter 186, 187 (1911).

<sup>670</sup> Said Mr. Justice Matthews, speaking for the United States Supreme Court: "The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of

remedies should necessarily continue.” — *Hurtado vs. California*, 110 United States 516, 536 (1884).

Compare the language in *Twining vs. New Jersey*, 211 United States 78, 101 (1909).

<sup>671</sup> *Hurtado vs. California*, 110 United States 516, 529 (1884).

<sup>672</sup> *Holden vs. Hardy*, 169 United States 366, 387 (1898).

<sup>673</sup> *Hurtado vs. California*, 110 United States 516, 531 (1884).

“The Constitution of the United States was ordained, it is true, by descendents of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many Nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, *Suum cuique tributere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.”

<sup>674</sup> *Munn vs. Illinois*, 94 United States 113, 134, (1876); *Employers' Liability Cases*, 32 Supreme Court Reporter 169, 174, (1912).

<sup>675</sup> “The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses . . . as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be best for the ‘good

and welfare of this commonwealth.' '' — Opinion of the Justices, 96 Northeastern 308, 315 (Massachusetts, 1911).

<sup>676</sup> Freund's *Police Power*, Sec. 111.

<sup>677</sup> Noble State Bank *vs.* Haskell, 219 United States 104, 111 (1911).

<sup>678</sup> See State *ex rel.* Davis-Smith *vs.* Clausen, 117 Pacific 1104, 1114 (Washington, 1911); Cunningham *vs.* Northwestern Improvement Company, 119 Pacific 554, 561 (Montana, 1911); State *ex rel.* Yapple *vs.* Creamer, 97 Northeastern 602, 603 (Ohio, 1912); Employers' Liability Cases, 32 Supreme Court Reporter 169, 175 (1912).

The foremost American authority on the extent and limits of the police power has written: "The principle that inevitable loss should be borne not by the person on whom it may happen to fall, but by the person who profits by the dangerous business to which the loss is incident, embodies a very intelligible idea of justice, and which seems to be in accord with modern social sentiment." — Freund's *Police Power*, Sec. 634.

<sup>679</sup> Mr. Justice Werner, speaking for the New York Court of Appeals, remarked that the Workmen's Compensation Act of New York "does nothing to conserve the health, safety, or morals of the employes, and it imposes upon the employer no new affirmative duties or responsibilities in the conduct of his business. Its sole purpose is to make him liable for injuries which may be sustained wholly without his fault." — Ives *vs.* South Buffalo Railway Company, 94 Northeastern 431, 442, 443 (New York, 1911).

But the learned Justice spoke without investigation and his uninformed opinion on a question of fact stands in flat contradiction to the recorded experience of every country that has established systematic accident indemnity.

<sup>680</sup> See the brief of Miles M. Dawson in Hearings before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document* No. 90, Vol. II, pp. 240-250, Sixty-second Congress, First Session, especially pp. 249-251; Schwedtmann and Emery's *Accident Prevention and Relief*, Chs. III, XIV, and Appendix, Part I.



<sup>681</sup> Many of these statutes are reviewed in *State ex. rel. Davis-Smith vs. Clausen*, 117 Pacific 1101 (Washington, 1911).

<sup>682</sup> *Atlantic Coast Line Railway Company vs. Riverside Mills*, 219 United States 186 (1911).

<sup>683</sup> *St. Louis and San Francisco Railway Company vs. Mathews*, 165 United States 1 (1897).

<sup>684</sup> *Chicago, Rock Island and Pacific Railway Company vs. Zernecke*, 183 United States 582 (1902).

<sup>685</sup> *Bertholf vs. O'Reilly*, 74 New York 509 (1878).

<sup>686</sup> *Exempt Firemen's Fund vs. Roome*, 29 Hun 391, 394 (New York, 1883); *Firemen's Benevolent Association vs. Lounsbury*, 21 Illinois 511 (1859).

<sup>687</sup> *Van Horn vs. People*, 46 Michigan 183; *McGlone vs. Womack*, 129 Kentucky 274.

<sup>688</sup> *Noble State Bank vs. Haskell*, 219 United States 104 (1911).

<sup>689</sup> *Holden vs. Hardy*, 169 United States 366 (1898) — a miners' eight-hour law is not invalid because applying to only one class of workmen; *Muller vs. Oregon*, 208 United States 412 (1908) — a woman's ten-hour law is not invalid because not applicable to men.

<sup>690</sup> *Missouri Pacific Railway Company vs. Mackey*, 127 United States 205 (1888); *Atchison, Topeka and Santa Fé Railway Company vs. Matthews*, 174 United States 96; *Louisville and Nashville Railway Company vs. Melton*, 218 United States 36 (1911); *Deppe vs. Chicago, Rock Island and Pacific Railway Company*, 36 Iowa 52 (1872).

<sup>691</sup> *Opinion of the Justices*, 96 Northeastern 308, 315 (Massachusetts, 1911).

<sup>692</sup> *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1115 (Washington, 1911); *Ives vs. South Buffalo Railway Company*, 94 Northeastern 431, 438 (New York, 1911).

<sup>693</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554, 561 (Montana, 1911).

<sup>694</sup> *Employers' Liability Cases*, 32 Supreme Court Reporter 169, 176 (1912).

<sup>695</sup> *Borgnis et al vs. Falk Company*, 133 Northwestern 209, 218 (Wisconsin, 1911) ; *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 608 (Ohio, 1912).

<sup>696</sup> *McLean vs. Arkansas*, 211 United States 539 (1909). An act regulating the weighing of coal at mines was not bad for applying only to mines which employ more than ten miners.

<sup>697</sup> *Borgnis et al vs. Falk Company*, 133 Northwestern 209, 217 (Wisconsin, 1911) ; *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 605 (Ohio, 1912).

<sup>698</sup> *Yick Wo vs. Hopkins*, 118 United States 356 (1886). The restriction of the laundry business to certain nationalities is not founded on reasonable grounds as to qualifications for that particular business.

<sup>699</sup> See *Laws of Nevada*, 1911, Ch. 183, Sec. 3 ; *Laws of New York*, 1910, Ch. 674, Sec. 2 (215).

<sup>700</sup> This point is expressly reserved in *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1115 (Washington, 1911), until a case shall present the question of a particular employment.

<sup>701</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554, 566 (Montana, 1911).

<sup>702</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554 (Montana, 1911) 561 (general scheme of the act is within the police power), 561 (not class legislation), 564 (does not violate guarantee of jury trial), 564 (does not deny due process of law).

<sup>703</sup> This point has not been specifically passed on in any of the workmen's compensation decisions but is hardly open to controversy.

<sup>704</sup> *Ives vs. South Buffalo Railway Company*, 94 Northeastern 431, 438, 439 (New York, 1911).

<sup>705</sup> Opinion of the Justices, 96 Northeastern 308, 316 (Massachusetts, 1911).

<sup>706</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554, 564 (Montana, 1911).

<sup>707</sup> *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 603 (Ohio, 1912).

<sup>708</sup> *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1119 (Washington, 1911).

<sup>709</sup> Opinion of the Justices, 96 Northeastern 308, 316 (Massachusetts, 1911); *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 605 (Ohio, 1912).

<sup>710</sup> *Constitution of Iowa*, Art. I, Sec. 9. Similar language is employed in the constitutions of Montana, Ohio, and Washington.

<sup>711</sup> *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1119 (Washington, 1911); *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554 (Montana, 1911).

There are plenty of cases to the effect that a State legislature may abolish or modify a common law right of action for torts. See *Martin vs. Pittsburgh and Lake Erie Railroad Company*, 203 United States 284, 295 (1906); *Atchison, Topeka and Santa Fé Railway Company vs. Sowers*, 213 United States 55 (1909); *Williams vs. Galveston*, 90 Southwestern 505 (Texas, 1905); *Campbell vs. Holt*, 115 United States 620 (1885).

<sup>712</sup> The Ohio and Washington cases were mandamus proceedings to compel the payment of warrants drawn by the State liability boards; the Wisconsin case was a bill in equity brought by certain employees of the Falk Company to enjoin the Company from filing an election under the Workmen's Compensation Act. In each case, the issues might have been disposed of without raising any constitutional question.

<sup>713</sup> Concurring opinion of Mr. Justice Chadwick in *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1120, 1121 (Washington, 1911).

<sup>714</sup> See *Constitution of Iowa*, Art. III, Sec. 1, and Art. V., Sec. 1.

<sup>715</sup> Opinion of the Justices, 96 Northeastern 308, 316 (Massachusetts, 1911); *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1119 (Washington, 1911); *Borgnis et. al. vs. Falk Company*, 133 Northwestern 209, 218-220 (Wisconsin, 1911); *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554, 564 (Montana, 1911); *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 607 (Ohio, 1912).

In *State ex rel. vs. Thomas*, 132 Northwestern 842 (Iowa, 1911),

the validity of an act vesting quasi-judicial functions in the county and State Superintendent of Schools was upheld. To similar effect see *Den vs. Hoboken Land Improvement Company*, 18 Howard 272 (United States, 1855); *Minneapolis, St. Paul and Sault Ste. Marie Railway Company vs. Railroad Commission*, 136 Wisconsin 146 (1908).

<sup>716</sup> See notes in the *Harvard Law Review*, Vol. XXIV, pp. 647-652; also joint protest signed by fourteen teachers of constitutional law in thirteen of the principal law schools of the country and printed in *The Outlook*, July 29, 1911.

<sup>717</sup> Compare Wambaugh's *Workmen's Compensation Acts: Their Theory and Their Constitutionality* in the *Harvard Law Review*, Vol. XXV, p. 129.

<sup>718</sup> *Borgnis et. al. vs. Falk Company*, 133 Northwestern 209, 218 (Wisconsin, 1911).

<sup>719</sup> *State ex rel. Yaple vs. Creamer*, 97 Northeastern 602, 605 (Ohio, 1912).

<sup>720</sup> Compare *People vs. Williams*, 189 New York, 131, 135 (1907).

<sup>721</sup> See the brief of Judge Nathaniel French in *Report of the Iowa Employers' Liability and Workmen's Compensation Commission*, Part II, pp. 229-250. Compare *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1116-1118 (Washington, 1911).

<sup>722</sup> *Workmen's Compensation Act of Kansas*, 1911, Sec. 11, (a), (1) — compensation to dependents not citizens of and residing in the United States or Canada limited to \$750; *Laws of New Hampshire*, 1911, Ch. 163, Sec. 6, (1), (a) — compensation only to widow, parents or children resident in New Hampshire; *Laws of New Jersey*, 1911, Ch. 95, Paragraph 12 — excludes alien dependents, not resident in United States; *Laws of Washington*, 1911, Ch. 74, Sec. 3 — excludes alien dependents, not resident in the United States, except parents and except as otherwise provided by treaty.

<sup>723</sup> *Bulletin of the Industrial Commission of Wisconsin*, Vol. I, No. 3, p. 87.

<sup>724</sup> From unpublished records in the office of the Industrial Commission of Wisconsin.

<sup>725</sup> Letter from Secretary Sapiro of the Industrial Accident Board of California, October 10, 1912.

<sup>726</sup> Letter from Secretary Sapiro of the Industrial Accident Board of California, September 10, 1912.

<sup>727</sup> *Bulletin of the Illinois Bureau of Labor Statistics*, July 1, 1912, pp. 15, 16.

<sup>728</sup> *Statistical Bulletin No. 1 of the Massachusetts Industrial Accident Board*, p. 7.

<sup>729</sup> *Statistical Bulletin No. 1 of the Massachusetts Industrial Accident Board*, p. 4.

<sup>730</sup> *Report to the Governor of New Jersey by the Employers' Liability Commission*, March, 1912, p. 4.

<sup>731</sup> *Laws of New Jersey*, 1911, Ch. 241, Sec. 2; *Acts and Resolves of Massachusetts*, 1911, Part III, Sec. 18.

<sup>732</sup> *Statistical Bulletin No. 1 of the Massachusetts Industrial Accident Board*, p. 3.

<sup>733</sup> Compare Freund in *Report of the United States Employers' Liability and Workmen's Compensation Commission in Senate Document No. 338*, pp. 256, 267, Sixty-second Congress, Second Session.

<sup>734</sup> *Review of the First Eight Months' Operation of the Workmen's Compensation Act* (pamphlet issued by the Industrial Insurance Commission of Washington).

<sup>735</sup> From unpublished data supplied by Chairman Crownhart of the Industrial Commission of Wisconsin. Stock company rates under the Wisconsin Compensation Act are taken as 100.

<sup>736</sup> Letter of William C. Archeer of the Ohio Liability Board of Awards, October 28, 1912.

<sup>737</sup> See the *Roseberry Liability and Compensation Law* (pamphlet issued by the Industrial Accident Board of California); *The Ohio Journal of Workmen's Compensation Insurance*, September, 1912. The statement as to the attitude of the Industrial Commission of



Wisconsin is based on repeated personal interviews with Chairman Crownhart.

<sup>738</sup> Ample evidence to this effect has been gathered by the Industrial Commission of Wisconsin. Some details will be published in a forthcoming *Bulletin*. The writer is not at liberty to mention particular cases, but certain large firms still enjoy the rates which were in effect under the old liability laws, before the defenses of fellow servant and assumption of risk were taken away.

<sup>739</sup> *Workmen's Compensation Act of the State of Ohio* (pamphlet issued by the Liability Board of Awards), p. 24.

<sup>740</sup> See especially Pound's *Liberty of Contract* in the *Yale Law Journal*, Vol. XVIII, p. 454; *The Need of a Sociological Jurisprudence* in *The Green Bag*, Vol. XIX, p. 607; and *Common Law and Legislation* in the *Harvard Law Review*, Vol. XXI, p. 383.

<sup>741</sup> Both the Supreme Judicial Court of Massachusetts and the Supreme Court of Wisconsin remarked upon the mildness of the acts before them. — See Opinion of the Justices, 96 *Northeastern* 308, 316 (Massachusetts, 1911); and *Borgnis vs. Falk Company*, 133 *Northwestern* 209, 222, 223-226 (Wisconsin, 1911), concurring opinions of Justices Barnes and Marshall.

<sup>742</sup> See Downey's *History of Labor Legislation in Iowa*, Ch. VIII.

<sup>743</sup> House File 303 by Hamilton; Senate File 125 by Clarkson, Thirty-fourth General Assembly, 1911.

<sup>744</sup> Statements to the writer by President A. L. Urick of the Iowa Federation of Labor and Secretary G. A. Wrightman of the Iowa Manufacturers' Association.

<sup>745</sup> *Laws of Iowa*, 1911, p. 230.

<sup>746</sup> The ensuing description of the Iowa Commission's work is based upon a typewritten copy of parts of the Commission's *Report* supplied to the writer in advance of publication through the kindness of Chairman Clarkson; Part II of the printed *Report*; and data kindly supplied to the writer by Secretary Given of the Iowa Employers' Liability Commission in July, 1912.

<sup>747</sup> From (then) unpublished data kindly supplied to the writer

by Secretary Given of the Iowa Employers' Liability Commission in July, 1912.

<sup>748</sup> Judge French's brief appears in the *Report of the Iowa Employers' Liability Commission*, Part II, pp. 229-250. Mr. Sherman's address is noted on p. 197 of the *Report*. For the remarks of Messrs. Pratt, Packer, and others see index to the same. Other statements in the text are based on information furnished by Secretary Given.

<sup>749</sup> *Report of the Iowa Employers' Liability Commission*, Part II.

<sup>750</sup> From a typewritten copy kindly furnished in advance of official publication by Chairman Clarkson of the Iowa Commission.

<sup>751</sup> See Hearings before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document* No. 90, Vol. I, Part III, Sixty-second Congress, First Session, statements of Samuel Gompers, for American Federation of Labor; A. B. Garretson, for the Order of Railway Conductors; W. G. Lee, for the Brotherhood of Railway Trainmen; James A. Emery, for the National Association of Manufacturers; G. A. Ranney, for the International Harvester Company.

<sup>752</sup> Legislation on the principle of occupational risks has been enacted as follows:

COUNTRY	YEAR	COUNTRY	YEAR
1. Alberta	1908	14. Luxemburg	1902
2. Austria	1887	15. Netherlands	1901
3. Belgium	1903	16. New South Wales	1900
4. British Columbia	1902	17. New Zealand	1900
5. Cape of Good Hope	1905	18. Norway	1894
6. Denmark	1898	19. Quebec	1909
7. Finland	1875	20. Queensland	1900
8. France	1898	21. Russia	1903
9. Germany	1884-1900	22. Spain	1900
10. Great Britain	1897-1906	23. Sweden	1901
11. Greece	1902	24. Switzerland	1911
12. Hungary	1907	25. Transvaal	1907
13. Italy	1898-1904	26. Western Australia	1902

<sup>753</sup> Mr. Justice Fullerton in State *ex rel.* Davis-Smith vs. Clausen, 117 Pacific 1101, 1114 (Washington, 1911).

<sup>754</sup> Schwedtmann and Emery's *Accident Prevention and Relief*, Ch. XIV, entitled *Findings and Recommendations of the Committee*.

<sup>755</sup> Frankel and Dawson's *Workingmen's Insurance in Europe*, Ch. VI.

<sup>756</sup> *First Report of the New York Employers' Liability Commission*, 1910, pp. 44-46.

<sup>757</sup> See Zacher's *Die Arbeiterversicherung im Auslande*; and *Deutsche Arbeiterversicherung*, published by the German Imperial Insurance Office.

<sup>758</sup> See, for example, the quotations in Schwedtman and Emery's *Accident Prevention and Relief*, pp. 148, 149. See especially the report of the parliamentary committee to the British Trade Union Congress of 1908.

<sup>759</sup> See brief of Miles M. Dawson, in Hearings before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document* No. 90, Vol. II, pp. 251-255, Sixty-second Congress, First Session; also Whelpley in *The Century Magazine*, June, 1911.

<sup>760</sup> See the briefs of Launcelot Packer, Frank B. Kellogg, Ernst Freund, Alfred P. Thom, James A. Lowell, and A. J. Sabath in *Report of the United States Employers' Liability and Workmen's Compensation Commission*, *Senate Document* No. 338, Vol. II, Sixty-second Congress, Second Session.

<sup>761</sup> *State ex rel. Davis-Smith vs. Clausen*, 117 Pacific 1101, 1120 (Washington, 1911).

<sup>762</sup> *Ives vs. South Buffalo Railway Company*, 94 Northeastern 431, 448 (New York, 1911). "As to the cases of *Noble State Bank vs. Haskell* . . . we have only to say that if they go so far as to hold that any law, whatever its effect, may be upheld because by the 'prevailing morality' or the 'strong and preponderant opinion', it is deemed 'to be greatly and immediately necessary to the public welfare', we can not recognize them as controlling of our construction of our own constitution."

<sup>763</sup> *Ives vs. South Buffalo Railway Company*, 94 Northeastern 431, 437, 438 (New York, 1911). The case is not in point as to the reversal of the burden of proof. But so many statutes have been enacted and upheld which reverse the burden of proof with respect to contributory negligence that the point seems hardly open to question.

<sup>764</sup> *Cunningham vs. Northwestern Improvement Company*, 119 Pacific 554, 566 (Montana, 1911).

<sup>765</sup> On the relative costs of various types of accident insurance see Frankel and Dawson's *Workingmen's Insurance in Europe*, under the several countries; brief of Miles M. Dawson in Hearings before the United States Employers' Liability and Workmen's Compensation Commission, *Senate Document* No. 90, Vol. II, pp. 249-255, Sixty-second Congress, First Session; *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. I, pp. 1095-1101 (Germany); Vol. II, p. 2059 (Norway).

<sup>766</sup> See *Compensation Insurance for Employers* (pamphlet issued by the Massachusetts Employees' Insurance Association); and any number of the *Journal of Workmen's Compensation Insurance*, issued by the Ohio Liability Board of Awards.

<sup>767</sup> [Swiss] *Loi federale d'assurance en cas de maladie et en cas d'accident*, June, 1911, Art. 51.

<sup>768</sup> *Twenty-fourth Annual Report of the United States Commissioner of Labor*, Vol. II, p. 2591.

<sup>769</sup> *Acts and Resolves of Massachusetts*, 1911, Ch. 751, Part III, Sec. 24.

<sup>770</sup> See, for example, *Report of the Iowa Employers' Liability and Workmen's Compensation Commission*, 1912, Part II, statements of J. W. Bettendorf, R. D. Emery, J. M. Hibbard, G. F. Hendel, A. Pal, and R. S. Sinclair.

<sup>771</sup> Compare Bohlen's *A Problem in the Drafting of Workmen's Compensation Acts* in the *Harvard Law Review*, Vol. XXV, pp. 328-348, 401-427, 517-547.

<sup>772</sup> See Dawson's *Cost of Employers' Liability and Workmen's Compensation Insurance* in the *Bulletin of the United States Bureau of Labor*, No. 90.

<sup>773</sup> See *Report of the United States Employers' Liability and Workmen's Compensation Commission* in *Senate Document* No. 90, Sixty-second Congress, First Session, brief of Miles M. Dawson and statements of Samuel Gompers, A. B. Garretson, W. G. Lee, and E. V. Knapp.

<sup>774</sup> *Report of the Iowa Employers' Liability Commission*, 1912.

<sup>775</sup> *Laws of Wisconsin*, 1911, Ch. 485.

<sup>776</sup> *Laws of California*, 1911, Ch. 399, Sec. 29.

<sup>777</sup> *Workmen's Compensation and Employers' Liability Acts of Michigan*, 1912, Part VI, Sec. 7.

<sup>778</sup> *Code of Iowa, Supplement of 1907*, Sec. 4999.

<sup>779</sup> See Commons's *The Industrial Commission of Wisconsin*, in *American Labor Legislation Review*, Vol. I, No. 4.

<sup>780</sup> *Revised Statutes of Wisconsin*, Sec. 2394-48.

<sup>781</sup> *Laws of Wisconsin*, 1911, Ch. 485.

<sup>782</sup> *Report of the Iowa Employers' Liability Commission*, 1912.

<sup>783</sup> The work of the safety exhibit was interestingly explained to the writer by Commissioner Beek of the Industrial Commission of Wisconsin.



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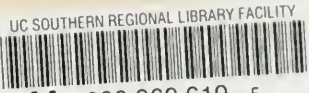






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